Supreme Court, U.S.
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No. 88-___

In The

Supreme Court of the United States

October Term, 1988

STATE OF HAWAII,

Petitioner,

v.

PROKO INDUSTRIES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. When a United States district court, presiding over a class action, enters an initial order purporting to bind a class, then later enters a second order adverse to a State after the State has specially appeared to argue the bar of the Eleventh Amendment, the court's lack of personal and subject matter jurisdiction, and other defenses, can the State's appeal from the second order properly be dismissed as an untimely appeal from the first order – without considering whether the initial order was entered without due process, or was void, erroneous, or entered at a time when the State lacked standing to appeal?

2. When a United States district court, sitting in diversity, denies a State's request for dismissal from a class action and for relief from judgment based upon, *inter alia*, the court's lack of subject matter and personal jurisdiction and the bar of the Eleventh Amendment, may the State appeal the denial order as a collaterally final order?

3. When a district court denies a State's request to dismiss the State from a class which has been enjoined by a court-issued bar against litigation, can the State appeal the denial order as an interlocutory order "refusing to dissolve or modify" an injunction, as provided in 28 U.S.C. § 1292(a)(1)?

4. Assuming that the State can avail itself of none of the above bases for appellate jurisdiction, do the district court's substantive amendment of a supposedly final order and the State's detrimental reliance on an order entered by the district court constitute grounds for considering the appealed order a "new judgment"?

QUESTIONS PRESENTED–Continued

5. If the opinion of the circuit court of appeals concludes that the court lacked appellate jurisdiction, is the court empowered to enter a judgment which affirms one of the orders entered in the trial court?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were the following:*

Proko Industries, Inc.

(Continued)

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*Fifty parties who were defendants in the United States District Court for the Eastern District of Pennsylvania were not parties to the proceeding before the United States Court of Appeals for the Third Circuit. The fifty defendants who were not parties in the proceeding before the circuit court were not parties to the settlement which was the subject of the appeal. The fifty defendants who did not participate as parties in the proceeding in the circuit court were: A C and S, Inc.; Armstrong World Industries, Inc.; Asbestospray Corp.; Asbestos Corporation Limited; Asbestos Fibres, Inc.; Asten Group, Inc.; Bell Asbestos Mines, Ltd.; Benjamin Foster Co., Division of Amchem Products; Bes-Tex, Inc.; Brinco Mining Ltd. (formerly known as Cassiar Resources Ltd.); C. Tennant & Sons; Cape Asbestos; Carey-Canada, Inc.; Combustion Engineering, Inc.; Dana Corp.; Eagle-Picher Industries, Inc.; Empire Ace Insulation Manufacturing Corp.; Fibreboard Corporation; Forty-Eight Insulation, Inc.; GAF; Georgia-Pacific Corp.; H.K. Porter Co.; Huxley Development Corp.; J.W. Roberts, Ltd.; Keene Corp.; Lac D'Amiante Du Quebec, Ltee.; National Gypsum Company; Nicolet Industries; Owens-Corning Fiberglas Corporation; Pfizer, Inc.; Pittsburg Corning Corp.; Raymark Industries, Inc.; Rock Wool Manufacturing Co., Inc.; Sprayed Insulation, Inc.; Sprayo-Flake Company; Sprayon Insulation & Acoustics, Inc.; Sprayon Research Corp.; Southern Textile Corp.; Standard Insulations, Inc.; The Celotex Corporation; The Flintkote Corporation; Turner Asbestos Fibres, Ltd.; Turner & Newall Limited; Union Carbide Corp.; Uniroyal, Inc.; United States Gypsum Company; U.S. Mineral Products Co.; W.R. Grace & Co.; Wilkin Insulation Co.; Worben Co., Inc.

LIST OF PARTIES

Owens-Illinois, Inc.

Kaiser Cement Corporation

Class Plaintiffs (School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Barnwell School District No. 45, Board of Education of the Memphis City Schools, and Napa Valley Unified School District)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner State of Hawaii respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on October 17, 1988.

OPINION BELOW

The memorandum opinion of the court of appeals is unreported and is reprinted in Appendix A. The order of the court of appeals denying the petition for rehearing

and rejecting the suggestion for rehearing in banc is unreported and is reprinted in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on October 17, 1988, and is reprinted in Appendix D. A petition for rehearing and suggestion of the appropriateness of rehearing in banc was timely filed on October 28, 1988, and was denied on the merits on December 12, 1988. Appendix E. Under 28 U.S.C. § 2101 and this Court's Rule 29.1, the time in which this petition may be filed extends to and includes March 13, 1989. This petition shall be filed within the time allowed. Jurisdiction in this court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the United States District Court for the Eastern District of Pennsylvania was alleged to have been conferred by 28 U.S.C. § 1332. Complaint 4, No. 83-0268 (E.D. Pa., filed Jan. 31, 1984), Pet. App. 54.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides that

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 1291 of Title 28, United States Code, provides in relevant part that

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.
>
> * * *

Section 1292 of Title 28, United States Code, provides in relevant part that

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * *

Hawaii Revised Statutes Section 27-1 provides in relevant part that

> The purpose of the chapter is to fix responsibility for certain functions, which are of statewide concern, in the state government. These functions are as follows:
>
> (1) Planning, construction, improvement and maintenance of public school facilities and grounds and the transportation of school children;

* * *

Hawaii Revised Statutes Section 26-7 provides in relevant part that

> The department of the attorney general shall be headed by a single executive to be known as the attorney general.
>
> The department shall administer and render state legal services, including furnishing of written legal opinions to the governor, legislature, and such state departments and officers as the governor may direct; represent the State in all civil actions in which the State is a party . . .

* * *

STATEMENT OF THE CASE

This case arises out of a class action pending before the United States District Court for the Eastern District of Pennsylvania, filed on behalf of public and private schools, and seeking to recover from asbestos manufacturers the cost of removing asbestos from facilities which these schools own or operate. Hawaii first learned of the settlement which is the subject of this appeal on May 18, 1987, when Hawaii's Department of the Attorney General received from the National Association of Attorneys General a copy of Court Order No. 84, reprinted in the *Asbestos Litigation Reporter*. Pet. App. 147. Order No. 84 recited that within 60 days of March 27, 1987, the class plaintiffs were required to send out two notices. One notice described the formation of a litigation class and the rights of each member to opt out. Pet. App. 151-160. A second notice described the terms of a settlement reached with two defendants (Proko Industries, Inc., and Owens-

Illinois, Inc.), the formation of a settlement class separate from the litigation class, and the rights of each member to opt out of this separate class. Pet. App. 161-173.

Attached to Order No. 84 as exhibits were two sample opt-out forms. At the bottom of both the litigation class opt-out form and the settlement class opt-out form, the following notation appeared in bold, underlined print:

(THE DEADLINE FOR MAILING THIS COMPLETED FORM IS AUGUST 1, 1987).

Pet. App. 173. The notice to the settlement class stated that the approval hearing for the settlement class would take place on August 14, 1987, and that statements in opposition to the settlement would be received through August 1, 1987. Pet. App. 165.[1]

After the Hawaii Department of the Attorney General received the reprinted copy of Order No. 84, the Department of the Attorney General determined that Hawaii would opt out of the settlement class. Hawaii's public school system is unique. The State itself – not the

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[1] Respondents Proko Industries, Inc., and Owens-Illinois, Inc., argued below that Order No. 84 contained "obvious inconsistencies" because the notice at one point referred to a June 8, 1987, date for opting out. The inconsistency, if it existed at all, was not obvious. The request for exclusion form attached to the notice stated only one deadline for opting out – August 1, 1987 – and the deadline statement was printed in bold type in a conspicuous location at the bottom of the form. The notice itself stated that the date of the approval hearing was August 14, 1987, and this date was consistent with the August 1, 1987, deadline for opting out.

counties – operates the public elementary and secondary school facilities. Hawaii Revised Statutes § 27-1 places the responsibility for "planning, construction, improvement and maintenance of public school facilities and grounds" upon the State. Hawaii determined to opt out of the class action because Hawaii intends to file a separate suit in State court to recover the millions of dollars it has spent to remove asbestos from its public schools. Hawaii sent in its opt-out notice on July 31, 1987. Pet. App. 148.

The problem from which this case arises was created when the district court amended Order No. 84 to change the deadline for opting out of the settlement class from August 1, 1987, to June 22, 1987. Hawaii was not a party to the proceedings that led to this amendment and has been able to reconstruct the events leading to the amendment only through its review of the court docket and records. Order No. 84, stating the August 1, opt-out date, was entered on March 30, 1987. On April 14, 1987, the clerk entered Order No. 85, which directed the class plaintiffs to send out notices to the settlement class stating a June 22, 1987, deadline for opting out. Pet. App. 187-88. The docket does not show that any motion was filed by any party between the entry of the original notice order, No. 84, and Order No. 85. The Court records do contain a motion filed by Defendant Fibreboard Corporation – on April 21, 1987 – asking the court to reinstate Order No. 84. Pet. App. 189-197. Defendant Fibreboard alleged that the court had violated due process by amending Order No. 84 on the basis of a "conference call" – held without notice to all parties – and that the notice procedure directed by the court in Order No. 85 "will engender confusion among class members and will

unnecessarily deprive the settlement class of the best notice practicable under the circumstances as required by F.R.Civ.P. 23(c)(2)." Pet. App. 191, 193. The court denied Fibreboard's motion. Pet. App. 198. As far as Hawaii has been able to determine, neither the court nor any party took any action to alert putative class members who may have received a copy of Order No. 84 that its terms had been changed by Order No. 85.

Hawaii's Department of the Attorney General did not learn of the court's amended, June 22, 1987, deadline for opting out until July 24, 1987 – more than one month after the deadline had passed. Pet. App. 148. An investigation conducted by the Hawaii Department of the Attorney General and Department of Education revealed that the amended notice had been received, date unknown, by a single State employee stationed in Hilo on the Island of Hawaii. Pet. App. 133, 148. The employee, Mr. Herbert Watanabe, was a "district business specialist" for Hawaii's Department of Education. Pet. App. 132. Under Hawaii law, neither Mr. Watanabe nor any other State employee outside the Department of the Attorney General has the authority to handle or settle matters in litigation. Haw.Rev.Stat. § 26-7, *Island-Gentry Joint Venture v. State*, 57 Haw. 259, 265, 554 P.2d 761, 766 (1976). The amended notice did not inform Mr. Watanabe that he should submit it to someone with settlement authority, or that an earlier order of the court had been published with

an August 1, 1987, deadline for opting out. Pet. App. 134-146.[2]

On July 22, 1987, the district court entered Order No. 88, approving the settlement (Appendix B). Order No. 88 stated in relevant part:

> 1. The members of the Settlement Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 64, excluding all schools which filed a request to be excluded as of July 21, 1987, from the settlement class pursuant to Fed.R.Civ.P. 23(c)(2).
>
> * * *
>
> 6. Plaintiffs and each and every member of the settlement class are permanently barred, either directly or representatively, from asserting against any settling defendant any of the claims which have been or could have been asserted in these class actions and which relate to or arise out of the sale or installation of asbestos-containing material in school buildings which are the subject of these class actions.
>
> * * *

Pet. App. 7-8. In the July 22, 1987, order, the court once again changed the date for opting out – this time to July 21, 1987, the amended date of the approval hearing. Pet. App. 7. Hawaii does not know whether any party present at the approval hearing raised the issue of the publication of the earlier court order and notice specifying an August 1, 1987, deadline. The order itself does not discuss either

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[2] In the district court, the settling defendants alleged in their motion to amend the July 22, 1987, order that notice had been sent to other addresses in Hawaii, but they filed no affidavit with their motion to support this allegation. Pet. App. 80-121.

of the two changes in the deadline for opting out of the settlement class. Although, on the date the judge signed the order, the original deadline for opting out had not arrived, the court made no provision in its order for persons and entities who may have relied on the earlier notice. Indeed, the judge certified in the July 22, 1987, order that "there is no just reason for delay in the entry of the judgment pursuant to Rule 54(b)" – without explanation as to why a just reason for delay did not exist.

No party filed a motion to amend the July 22, 1987, within 10 days of its entry, and no party filed an appeal within 30 days of its entry. On October 13, 1987, the settling defendants, Proko Industries and Owens-Illinois, filed a document entitled "Motion to Amend Pretrial Order No. 88 of the Honorable James M. Kelly dated July 21, 1987, to Set Forth a List of Schools Excluded From the Settlement Class." Appendix G. The settling defendants cited no rule as authority for the motion. The motion alleged that on August 19, 1987, some 28 days after the court's entry of its order approving the settlement, one of the counsel for the class plaintiffs checked to determine which opt-out notices had been post-marked on or before July 21, 1987, and that 353 schools had sent in opt-out notices postmarked on or prior to that date. Pet. App. 83. The motion requested that the court amend Order No. 88 to define and limit the parties excluded from the settlement class to the 353 entities who sent in opt-out requests postmarked on or before July 21, 1987. Pet. App. 83-84. The settling defendants served their motion upon the Attorney General of the State of Hawaii and three other entities which allegedly were "untimely" in sending in their notices to opt out. Pet. App. 84. At the time of this

service, Hawaii had made no appearance of any kind in this action.

On December 11, 1987, Hawaii served a memorandum in opposition to the settling defendant's motion. Appendix I. Hawaii made a special appearance only, and argued, inter alia, that 1) the court lacked subject matter and personal jurisdiction over the State; 2) the Eleventh Amendment barred the court from entering any judgment or order against the State; 3) assuming that the court had any jurisdiction, Hawaii was misinformed by the court's notice in the form of Order No. 84 and its opt-out notice should be deemed timely; and 4) the amended notice sent to Mr. Watanabe was inadequate both because the plaintiffs had failed to identify and serve the proper members of the settlement class and because the notice was inadequate in its content. Pet. App. 122-180. Hawaii asked the court to enter an order dismissing Hawaii from the settlement class and declaring that Hawaii was not bound in any respect to the settlement approved by the court in its prior order. Pet. App. 179-180. In order to obtain the relief it sought, Hawaii was not required to file a separate motion. Rule 12(h)(3) of the Federal Rules of Civil Procedure permits anyone to make a "suggestion" that the court lacks jurisdiction of the subject matter, and this suggestion need not take the form of a motion. *Puente v. Spanish Nat.-State*, 116 F.2d 43 (2d Cir. 1940); 5 Wright & Miller, *Federal Practice and Procedure*, Civil § 1393, p. 867 (1969). Local Rule 20(a) of the district court permits a party opposing a motion to submit to the court a form of order to "deny *or amend* the relief sought by the motion (emphasis added)."

In an order entered on March 4, 1988, the district court denied the relief sought by Hawaii and granted the relief sought by the settling defendants. Appendix C. Hawaii filed its notice of appeal on March 28, 1988. Appendix K.

In its opinion, the third circuit "dismissed" Hawaii's appeal after discussing three possible grounds for dismissal. Pet. App. 3. In its judgment, however, "issued" after the court denied Hawaii's petition for rehearing, the court "affirmed" the July 22, 1987, order. Pet. App. 46.

REASONS FOR GRANTING THE WRIT

This court should grant the petition for certiorari because the decision of the circuit court conflicts with the decisions of this Court and with the decisions of other circuit courts which have addressed the same matters. The petition should be granted not merely because of this conflict but also because the questions presented are important to the administration of justice in the federal system. This Court has granted petitions for certiorari to resolve many of the standing, due process, and practical legal problems posed by class actions.[3] The Court's review of the instant case will resolve important issues pertinent to the judicial administration of class actions, the requisites of due process for absent class members,

[3] *Marino v. Ortiz*, 108 S.Ct. 586 (1988); *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1984); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

the alleged preclusive effect of void or erroneous judgments entered pursuant to Rule 54(b), and the standards to be applied by appellate courts reviewing such judgments. In simple terms, this case merits review by this Court because the third circuit has, in refusing to review the district court's order, left standing an injunction purporting to bar Hawaii from suing two asbestos manufacturers to recover the costs of removing asbestos from Hawaii's public schools. A result more abhorrent to the Eleventh Amendment could not be imagined.

I. The Third Circuit's Holding that the July 22, 1987, Order Precludes Appellate Review of the March 4, 1988, Order Conflicts with the Precedents of this Court and Those of Other Circuits.

Hawaii's notice of appeal, filed March 28, 1988, stated that Hawaii appealed from the March 4, 1988, order, which amended the July 22, 1987, order. Pet. App. 184. The third circuit dismissed Hawaii's appeal after discussing three possible grounds for dismissal: 1) the appeal from the March, 1988 order was, in reality, an appeal from the July, 1987 order and was therefore untimely; 2) the March, 1988 order was not collaterally final; and 3) the March, 1988 order was not appealable under 28 U.S.C. § 1292(a)(1). The opinion does not specify whether one, or all three, grounds constituted the basis for dismissal.

The third circuit's finding that Hawaii's appeal of the March, 1988 order is an untimely appeal from the July, 1987 order is in error for three reasons. First, the July, 1987 order was void and a legal nullity. As a legal nullity, the order can be accorded no preclusive effect whatsoever

and can be directly or collaterally challenged at any time. A State has no obligation to appeal a void order entered against it by a federal court; it can collaterally attack the order as void in proceedings held in State court.[4] Second, if the July order was not void, it was erroneously certified as final under Rule 54(b). This Court has held that the circuit courts have the power to declare Rule 54(b) certifications erroneous.[5] The eighth circuit has held that an erroneously certified 54(b) judgment, unappealed by a party who possessed complete standing to appeal, cannot serve to preclude or render untimely the appeal from a later judgment in the same action raising the same issues initially resolved in the 54(b) order.[6] Third, the third circuit, in finding that Hawaii was *obliged* to appeal the July, 1987 order, treated Hawaii as if it were a full-fledged party to the action with complete standing to appeal any adverse order. In reality, in addition to having no proper notice of the July, 1987 order, Hawaii was at the time of its entry either a non-party to the action or, at most, an absent class member. In either capacity, Hawaii had – at that time – no standing to appeal. If Hawaii is considered to have been at that time an absent class member, its interests were supposed to have been represented by the named plaintiffs. The named plaintiffs' failure to appeal the July, 1987 order cannot be held to prejudice Hawaii.[7]

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[4] *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940).

[5] *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1979)

[6] *Page v. Preisser*, 585 F.2d 336, 338 (8th Cir. 1978).

[7] *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973).

Hawaii, as a separate entity, gained standing to appeal only when Hawaii was haled into court by defendants' service upon Hawaii of their motion to amend the July, 1987 order. While denominated a motion to amend, the defendants' motion could have been labeled a motion to determine that certain entities had failed to file timely opt-out requests. The trial court permitted Hawaii to appear specially to raise its objections and defenses, and to seek relief from the prior order. The court's March, 1988 order rejected Hawaii's objections and defenses and denied the relief sought by Hawaii. Having appeared before the court as an individual entity, Hawaii finally had gained standing to appeal in its own right. Hawaii filed its notice of appeal in a timely manner within 30 days of the March 4, 1988, order.

The July, 1987 order was void on several grounds, including lack of due process. This Court has held that, in a class action, due process to absent class members requires, at a minimum, 1) adequate notice of the action, 2) an opportunity to opt-out of the action and 3) adequate representation of the interests of the absent class members by the named plaintiffs. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985). In the instant case, neither the district court nor the named plaintiffs provided adequate notice of the action and an effective opportunity to opt out. The court and named plaintiffs either had, or should have had, knowledge that Order No. 84, stating an August 1, 1987, deadline for opting out, had been published in the *Asbestos Litigation Reporter*. Possessed of such actual or constructive knowledge, the court and the named plaintiffs should have prevented the amendment of the deadline to an earlier date. In essence, the court

deprived Hawaii of the opportunity to opt out, and the named plaintiffs permitted this to happen. Ironically, Defendant Fibreboard did a much better job of representing the interests of absent class members than did the named plaintiffs, because Fibreboard opposed the issuance of confusing amended notices. Pet. App. 189-197. Had the named plaintiffs supported the Fibreboard motion, rather than opposed it, the opt-out date would probably not have been changed and Hawaii would not now be a petitioner in this Court.

An additional due process burden which the named parties must shoulder in a class action is the obligation to *identify* absent class members. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 (1978). Had the named plaintiffs properly identified class members they would have learned that one of the entities they sought to bring into the class was the State of Hawaii. At that point, named plaintiffs should have recognized that, because their action rested entirely on the diversity jurisdiction of 28 U.S.C. § 1332, Hawaii could not be a member of any class. A State cannot be considered a "citizen of a State" under the language of 28 U.S.C. § 1332.[8] Assuming that the named plaintiffs could be excused for failing to determine that Hawaii's public school system was State-operated, the named plaintiffs could have provided instructions in the amended settlement notice to refer the

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[8] *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971); *State Highway Commission of Wyoming v. Utah Const. Co.*, 278 U.S. 194, 199-200 (1929); *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894); *Ramada Inns, Inc. v. Rosemount Memorial Park Ass'n*, 598 F.2d 1303, 1306 (3d Cir. 1979); *Harris v. Pennsylvania Turnpike Comm.*, 410 F.2d 1332, 1333-34 n.1 (3d Cir. 1969).

notice to an established legal department representing the addressee or to someone with settlement authority. Further, assuming that the amendment to the opt-out deadline was necessary, the named plaintiffs could have asked the court to make appropriate provision in its settlement order to honor opt-out notices sent in on or before August 1, 1987, could have appealed the July, 1987 order, or could have asked the court to determine whether a conflict of interest was presented by the necessity to file an appeal.[9] If the named plaintiffs failed to provide adequate representation of the interests of absent class members, the judgment cannot bind absent class members. *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973).

A judgment entered without due process is void and a legal nullity. *Walker v. City of Hutchinson*, 352 U.S. 112, 115-17 (1956); *City of New York v. New York, New Haven & Hartford R. Co.*, 344 U.S. 293, 297 (1953); *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877); *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). Void judgments have no preclusive effects on the party adversely affected by the judgment – he may attack the judgment directly or collaterally at any time. *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir. 1971); *Restatement (Second) of Judgments*, § 65 comment c (1982).

Assuming, solely for purposes of argument, that the July 22, 1987, order was not void on due process grounds, it was void because the district court lacked subject

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[9] *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1178 (5th Cir. 1978).

matter[10] and personal jurisdiction.[11] The court lacked subject matter jurisdiction because a State is not considered a citizen of any State for diversity purposes,[12] because the complaint failed to allege that each member of the class had damages in the jurisdictional amount,[13] and because the Eleventh Amendment bars federal courts from exercising jurisdiction over States. The Eleventh Amendment bars a federal court's exercise of jurisdiction over a State even when the federal court seeks to cast the State in the role of involuntary plaintiff rather than defendant. *Cory v. White*, 457 U.S. 85, 90 (1982)(State may not be forced to become interpleader claimant); *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 300 (1937). In *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940), the Court held, "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." In *Edelman v. Jordan*, U.S. 651, 678 (1974), the Court held that the Eleventh Amendment defense was sufficiently jurisdictional that it could be raised for the first time on appeal.

Despite the Court's clear precedent, in a post-*Edelman* decision, the third circuit rejected the argument that a judgment against a State was void on Eleventh Amendment grounds. *Vecchione v. Wohlgemuth*, 558 F.2d 150, 159 (1977), cert. denied, 434 U.S. 943 (1977). In a footnote to

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[10] *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940).

[11] *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 110 (1969); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

[12] See footnote 8, *supra*.

[13] *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

the *Vecchione* opinion, 558 F.2d at 159 n.7, the third circuit expressly recognized that its opinion was in conflict with that of the sixth circuit in *Jordon v. Gilligan*, 500 F.2d 701, 710 (1974), cert. denied, 421 U.S. 991 (1975).[14]

The district court lacked personal jurisdiction over Hawaii because Hawaii received neither the service of process required by Rule 4 (d)(6) of the Federal Rules of Civil Procedure nor adequate notice of the class action. The amended notice, sent to an individual State employee, cannot be construed to be notice to the State. In *In re Armored Car Antitrust Litigation*, 645 F.2d 488, 493 (1981), the fifth circuit held that when a State and its subdivisions sent in conflicting requests to opt out of a class action, the Attorney General's was controlling because only he has the authority to speak for the State. In *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985), this Court held that a public entity could be held liable in a successful 42 U.S.C. § 1983 action against a public employee only if the public entity itself "received notice and an opportunity to respond."

If the July order was not void, it still should not be given preclusive effect because it either was not final or because, though final, it was entered at a time when Hawaii lacked standing to appeal. In *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980), this Court held

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[14] The actual source of the conflict may lie in the third circuit's conclusion that a State's general appearance in litigation waives the Eleventh Amendment defense. 558 F.2d at 158. In the instant case, Hawaii made a special appearance only and raised the Eleventh Amendment in its first and only appearance before the trial court. Pet. App. 122-180.

that, while district courts should ordinarily be given the latitude to act as "dispatchers" of judgments labelled final under Rule 54(b), the trial court's discretion is reviewable by the appellate court. In *Page v. Preisser*, 585 F.2d 336 (1978), the eighth circuit squarely faced the issue addressed by the third circuit in the instant case and rendered a decision directly in conflict with the third circuit's. *Preisser* holds that the failure to appeal a 54(b) judgment does not preclude an appeal from a later judgment, if the 54(b) certification was erroneous. 585 F.2d at 338. In *Preisser*, unlike the instant case, the appellant had appeared and fully litigated the issues addressed in the 54(b) judgment prior to its entry, yet the court still found that the appellant could challenge the propriety of the certification under Rule 54(b) and, if successful, could gain appellate review of the matters addressed in the earlier, unappealed judgment. *Id.*

In the instant case, the district court erroneously certified the July, 1987, order under Rule 54(b) because the order was not truly final and because there was, contrary to the court's certification, "just reason for delay." At the time the order was entered, the members of the class purportedly bound by the order had not even been determined. The parties opting out were not determined until 28 days after the order was entered. Pet. App. 81. The court and parties treated the July order as non-final by amending it more than seven months after its entry, and the amending order states that it – not the prior order – sets forth the "complete and final" list of entities opting out of the settlement class. Pet. App. 10. Finally, if any case ever presented just reason for delay, this one did. The court itself had misinformed absent

class members of the opt-out deadline through publication of Order No. 84, and the court should have delayed entry of its final order until the issues raised by the prior notice were properly resolved.

Assuming that the July 22, order *was* final, Hawaii, as either a non-party or an absent class member, had no standing to appeal the order at the time of its entry. There is considerable inter-and intra-circuit conflict on the issue of whether an absent class member has the right to appeal a judgment.[15] This conflict may not have been resolved by this Court in *Marino v. Ortiz*, 108 S.Ct. 586 (1988), because the appellants found to lack standing to appeal in *Marino* were neither absent class members nor intervenors but were, instead, non-parties who claimed to be adversely affected by the class action settlement. *Hispanic Soc. v. New York City Police Dept.*, 806 F.2d 1147, 1152

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[15] The eleventh circuit has a firm rule that the absent class member has no standing to appeal. *Guthrie v. Evans*, 815 F.2d 626, 628 (1987). The third circuit gives automatic standing to appeal to an absent class member in regard to "any final order." *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 32 (1971). The fifth and seventh circuits have rendered decisions that are difficult to reconcile, even within their respective circuits. Compare *Walker v. City of Mesquite*, 858 F.2d 1071, 1075 (5th Cir. 1988)(class member has no standing to appeal) with *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 173 (5th Cir. 1979)("affected" class members have standing to appeal) and *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1121 (7th Cir. 1979)(class members who failed to object to settlement still have standing to appeal) with *Research Corporation v. Asgrow Seed Company*, 425 F.2d 1059, 1060-61 (7th Cir. 1970)(only class members who intervene or make an objection to a dismissal or compromise have standing to appeal).

(2d Cir. 1986). This Court held that the *Marino* appellants should have intervened to gain standing to appeal. 108 S.Ct. at 587. Hawaii, however, could not have moved to intervene because, unlike the appellants in *Marino*, Hawaii challenged the subject matter jurisdiction of the court. "An existing suit within the court's jurisdiction is a prerequisite of an intervention." *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1927).

Hawaii gained standing to appeal when, on March 4, 1988, the district court entered an order which denied Hawaii's attempt to dismiss Hawaii from the settlement class and relieve Hawaii from the July, 1987 order. When a non-party is haled into court and challenges the court's jurisdiction to enter an adverse order, there is standing to appeal. *S.E.C. v. Wencke*, 783 F.2d 829, 834-35 (9th Cir. 1986). When a class member appears to gain an adjudication of his right to opt out of a class, the circuit courts have uniformly treated the adjudication as appealable, even when the disposition did not present the significant additional grounds of appealability present in the instant case. *In re International House of Pancakes Franchise Litigation*, 536 F.2d 261 (8th Cir. 1976); *In re Four Seasons Securities Laws Litigation*, 493 F.2d 1288 (10th Cir. 1974); *Manhattan-Ward, Inc. v. Grinnell Corporation*, 490 F.2d 1183 (2d Cir. 1974).

II. An Order Denying a State's Request for Dismissal From a Class Action, Grounded Upon the Eleventh Amendment and the Federal Court's Lack of Subject Matter and Personal Jurisdiction, is an Appealable Order.

This Court has held that orders which 1) "conclusively determine the disputed question"; 2) "resolve

an important issue completely separate from the merits of the action"; and 3) are "effectively unreviewable on appeal from a final judgment" are appealable orders. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The ninth, sixth, fourth, seventh, and second circuits have held that orders denying a dismissal sought on sovereign immunity grounds are collaterally final orders. *Marx v. Government of Guam*, No. 87-2713, 1989 W.L. 3923, ___ F.2d ___ (9th Cir. 1989) (common law sovereign immunity); *Gould, Inc. v. Pechiney Ugine Kuhlman*, 853 F.2d 445, 450-51 (6th Cir. 1988) (foreign sovereign immunity); *Foremost Guaranty Corp. v. Community Savings & Loan, Inc.*, 826 F.2d 1383, 1386 (4th Cir. 1987) (Eleventh Amendment); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (foreign sovereign immunity); *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), cert. denied, 107 S.Ct. 2484 (1987) (Eleventh Amendment). Only the first circuit has held that an order rejecting the Eleventh Amendment defense is not a collaterally final order. *Libby v. Marshall*, 833 F.2d 402, 405 (1st Cir. 1987). This Court has held that a denial of a president's claim of absolute immunity is a collaterally final order. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

In the instant case, the third circuit found that the order of March 4, 1988, was not collateral to the order of July 22, 1988. Pet. App. 3. The appropriate question is whether an order is collateral to the merits – not whether it is collateral to a prior order entered in the action. The precedents cited above overwhelmingly support the conclusion that orders of the kind entered on March 4, 1988, are collaterally final under the *Cohen* doctrine. The court's

order conclusively determined disputed matters, entirely separate from the merits, in a manner effectively unreviewable on appeal from a final judgment.

III. If the March 4, 1988, Order was Not Appealable as a Collaterally Final Order, It was Appealable as an Interlocutory Order Under 28 U.S.C. § 1292(a)(1).

The order entered July 22, 1987, prohibited class members from "directly or representatively" asserting any claims against the settling defendants related to asbestos in school buildings. Pet. App. 8. While the order was not labelled an "injunction," the language of the order is virtually identical to that of an injunction reviewed in *In re Baldwin-United Corp.*, 770 F.2d 328, 334 (2d Cir. 1985), except for the words "directly and representatively." In *Baldwin*, the court found that the injunction against States escaped the bar of the Eleventh Amendment only because the injunction prohibited the States from suing as representatives of their citizens rather than in their own right. *Id.* at 341.

In the instant case, when Hawaii filed its opposition to the defendants' motion to amend the July 22, order, Hawaii asked the court to modify or dissolve the injunction by removing Hawaii from the settlement class and declaring that Hawaii was not bound by the settlement. Pet. App. 122-80. The court's order of March 4, 1988, refused to modify or dissolve the injunction, and was appealable under 28 U.S.C. § 1292(a)(1) even if considered interlocutory. The existence of a prior, un-appealed injunction does not bar Hawaii's appeal from the order refusing to modify the injunction, because of the voidness

and standing arguments presented above. If it is assumed that Hawaii could have appealed the prior order, an appeal from the March 4, 1988, order is still not barred, because 28 U.S.C. § 1292(a)(1) gives a right of appeal to the party adversely affected by the refusal to modify. *Professional Plan Examiners of N.J., Inc., v. Lefante*, 750 F.2d 282, 287 (3d Cir. 1984); *Buckhanon v. Percy*, 708 F.2d 1209, 1213 (7th Cir. 1983)(permitting appeal but limiting scope of review); *Cerro Metal Products v. Marshall*, 620 F.2d 964, 972 (3d Cir. 1980)(permitting appeal and permitting scope of review to extend to original injunction).

IV. The Time For Appeal was Extended By the Court's Amendment of Its Prior Order.

In *F.T.C. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952), this Court stated the principle that when a court enters an order changing "matters of substance" or clarifying ambiguity in a prior order, the time for appeal begins to run anew from the date the amending order is entered. The principle has been applied by circuit courts to amending orders granted after the district court has heard a motion alleged to be untimely under Rule 59 of the Federal Rules of Civil Procedure. *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986); *Cornist v. Richland Parish School Board*, 479 F.2d 37, 39 (5th Cir. 1973).

In the instant case, the amending order entered March 4, 1988, changed matters of substance and was an entirely new judgment. A judgment consists of much more than words on paper; its character is determined by the proceedings that led to the judgment. The issue of Hawaii's immunity from suit, the court's lack of personal

and subject jurisdiction, and the timeliness of Hawaii's opt-out notice were not raised prior to the entry of July 22, 1987, order, but were raised prior to the entry of the March 4, 1988, order. The court, by implicitly ruling on these issues, entered a new judgment. The time to appeal began to run anew from the entry of the new judgment.

If the March 4, 1988, order was a new judgment, Hawaii's notice of appeal filed March 28, 1988, was timely, even if it is assumed that the July, 1987 order was final, valid, properly certified under Rule 54(b), and entered at a time when Hawaii had standing to appeal. If the March 4, 1988, order may not properly be considerd a new judgment, and all of the other arguments made above are rejected, the unique circumstances of this case justify deeming the notice of appeal to be timely. *Thompson v. I.N.S.*, 375 U.S. 384, 387 (1964). Hawaii sent in its opt-out request in reliance on the trial court's initial order. Had the court not amended the initial notice, or had the court made proper provision to prevent prejudice resulting from the amendment, either there would have been no need to appeal or the appeal time would have commenced only after the court reviewed all opt-out requests to determine their timeliness under the court's initial notice. In this class action, as in all class actions, the interests of class members were supposed to have been represented by the named plaintiffs. Instead of insuring that class members received a proper opportunity to opt out of the class, the named plaintiffs first caused contradictory opt-out notices to be sent out and then failed to take action that could have protected the interests of class members who had relied on the initial notice. Should Hawaii's other arguments demonstrating the existence of appellate jurisdiction fail, these unique

circumstances should be considered in determining whether Hawaii's appeal was timely.

V. If the Circuit Court's Opinion is Correct, Its Judgment is in Error.

The circuit court's opinion stated "Hawaii's appeal will therefore be dismissed" (Pet. App. 3), but its judgment states that the July 22, 1987, order is "affirmed." Pet. App. 46. If the third circuit was "without jurisdiction to hear the appeal, it was without jurisdiction to decide the merits." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 549 (1986).

CONCLUSION

Hawaii respectfully requests that this Court reverse the decision of the court of appeals and direct it to enter an order consistent with this Court's opinion or, in the alternative, that this Court reverse and remand to the court of appeals with direction to hear Hawaii's appeal on the merits.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1222

In Re: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURGH SCHOOL DISTRICT

and

NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., et al.

State of Hawaii,
Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 83-0268)

District Judge: Hon. James McGirr Kelly

Submitted Under Third Circuit Rule 12(6)
September 29, 1988

Before: GIBBONS, *Chief Judge*, SEITZ, *Circuit Judge*
and FARNAN, *District Judge**

(Opinion Filed: OCT 17 1988)

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*Hon. Joseph J. Farnan, Jr., United States District Judge for the District of Delaware, sitting by designation.

MEMORANDUM OPINION OF THE COURT

/s/ John J. Gibbons
GIBBONS, *Chief Judge:*

The State of Hawaii purports to appeal from Order No. 109, amending a previously entered Judgment Order, No. 88 dated July 21, 1987, approving a settlement with two defendants, Owens-Illinois, Inc. and Proko Industries, Inc., in a Fed. R. Civ. P. 23 (b)(3) class action seeking recovery on behalf of public school districts and private schools of the cost of removing friable asbestos from their buildings.

The notice of appeal was entered on March 28, 1988. The appeal, however, calls into question not the amendment but the underlying order approving the settlement, insofar as it purports to bind Hawaii as a member of the settlement class. Hawaii contends that the order approving the settlement cannot bind it because the notice of its right to opt out of the class was defective, and because even if the notice was sufficient the Eleventh Amendment prohibits a federal court from requiring a state to opt out of a class action. We do not reach these contentions, all of which bear on the validity of the order approving the settlement, because as to that order Hawaii's notice of appeal is untimely.

Hawaii contends that the March 4, 1988 order is controlling for purposes of Fed. R. App. P. 4(a)1) because the motion to amend the settlement order was a Fed. R.

Civ. P. 52(b) or 59 motion. The motion was not so denominated. Had it been, it was clearly untimely under either rule since it was made more than two months after the order approving the settlement. Thus it did not extend the time to appeal from that order. *See United States v. McKnight*, 593 F.2d 230 (3d Cir. 1979).

Hawaii also contends that the March 4, 1988 order is appealable as collaterally final under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The March 4, 1988 order amended or clarified a settlement order certified as final pursuant to Fed. R. Civ. P. 54(b). It is in no way collateral to that order. The *Cohen v. Beneficial Industrial Loan Corp.*, rule does not provide a basis for an untimely appeal from a final judgment.

Finally, Hawaii contends that we have appellate jurisdiction under 28 U.S.C. § 1292(a)(3). The provision which Hawaii relies on as an injunction is in the original order approving the settlement, entered on July 21, 1987. It bars suits by class members against the settling defendants. Assuming, without deciding, that this provision is an injunction, it was not modified by the March 4, 1988 order. The motion by the settling defendants to modify that order in other respects did not enlarge Hawaii's time to appeal from the July 21, 1987 order.

Hawaii's appeal will therefore be dismissed. Costs will be taxed in favor of the plaintiff class representative

as appellee, but not in favor of Kaiser Cement Corporation.

TO THE CLERK OF THE COURT:

/s/ John J. Gibbons
Chief Judge

APPENDIX B

IN THE UNTIED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

JUDGMENT PURSUANT TO F.R.CIV.P. 54(b)
AND PRETRIAL ORDER NO. 88
FINALLY APPROVING 1986 AGREEMENT OF
SETTLEMENT WITH DEFENDANTS OWENS-ILLINOIS,
INC. AND PROKO INDUSTRIES, INC.

(Filed July 21, 1987)

WHEREAS, certain class actions consolidated as *In Re Asbestos School Litigation*, Master File No. 83-0268 (E.D.Pa.) (hereinafter, the "Class Actions"), have been filed in this Court on behalf of an asserted class (hereinafter, the "Class") alleged therein against, *inter alia*, Owens-Illinois, Inc. (hereinafter "O-I"), and Proko Industries, Inc. (hereinafter "Proko");

WHEREAS, on March 26, 1986, class plaintiffs and defendants O-I and Proko (hereinafter, "Settling Defendants") entered into a settlement agreement, entitled "1986 Agreement of Settlement With Defendants Owens-Illinois, Inc. and Proko Industries, Inc." (hereinafter, the "Partial Settlement");

WHEREAS, on June 17, 1986, Pretrial Order No. 64 was entered by this Court preliminarily approving the

Partial Settlement; certifying a Settlement Class with a definition identical to that of the litigation class certified in Pretrial Order No. 20 (hereinafter, "Settlement Class"); and directing that notice be given to the class of the proposed Partial Settlement, and of a hearing to determine whether the proposed Partial Settlement should be approved as fair, adequate and reasonable and to hear any objections thereto;

WHEREAS, such a hearing was held, as noticed, on July 21, 1987, and, prior to the hearing, proof of notice of the proposed Partial Settlement was presented and filed, on July 17, 1987;

WHEREAS, notice of the Partial Settlement was sent to all members of the Settlement Class certified in Pretrial Order No. 64, which notice advised class members of their right to appear at the hearing in support of or in opposition to the proposed Partial Settlement;

WHEREAS, members of the Settlement Class also were given the opportunity to file a Request for Exclusion from the Settlement Class on or before June 22, 1987, and a sworn statement listing the schools which have timely filed such Requests for Exclusion was filed with the Court on July 17, 1987;

WHEREAS, the Court has heard counsel on behalf of the parties, and has reviewed all of the submissions presented with respect to the proposed Partial Settlement.

NOW, THEREFORE, on this 21st day of July, 1987, it is hereby ORDERED, ADJUDGED AND DECREED THAT:

1. The members of the Settlement Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 64, excluding all schools which filed a request to be excluded [as of July 21, 1987 jmk.]* from the Settlement Class pursuant to Fed.R.Civ.P. 23(c)(2).

2. The Partial Settlement is in all respects fair, adequate, reasonable and proper, and in the best interests of the Settlement Class, and is approved.

3. Notice to the Settlement Class, as required by Rule 23(e) of the Federal Rules of Civil Procedure, has been given in an adequate and sufficient manner, complying in all respects with such Rules and due process, including, but not limited to, the forms of notice and the methods of identifying and giving notice to the Settlement Class.

4. Except as provided herein, these Class Actions are dismissed with prejudice and on the merits and without costs only to Settling Defendants. This dismissal shall apply to all actions, causes of action, and claims, which Plaintiffs and the members of the Settlement Class, or any of them, have asserted [or could assert] against the Settling Defendants in these Class Actions, and which relate to or arise from out of the sale or installation of asbestos-containing material in school buildings which are the subject of these actions.

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*Bracketed material interlineated in text in handwriting.

5. The schools referred to in paragraph 1 hereof which requested exclusion from the Class shall not participate in the proceeds of the Partial Settlement hereby approved or receive any benefit thereunder.

6. Plaintiffs and each and every member of the Settlement Class are permanently barred, either directly or representatively, from asserting against any Settling Defendant any of the claims which have been [or could have been]* asserted in these class actions and which relate to or arise out of the sale or installation of abestos-containing material in school buildings which are the subject of these class actions.

7. Jurisdiction is hereby retained as to all matters related to the administration and consummation of the Partial Settlement hereby approved.

8. This Order and the Partial Settlement are not intended and are not to be construed as a release or dismissal by plaintiffs and Settlement Class Members of any claims or rights which any of them have or may have against any non-settling defendant or defendants.

9. The Court finds that there is no just reason for delay in the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Clerk of the District Court is directed to enter this Judgment. Certification under Rule 54(b) will not result in unnecessary appellate review nor will review of the adjudicated claims moot any further developments in this case. Even if subsequent appeals are filed, the nature of these claims

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*Bracketed material interlineated in text in handwriting.

are such that the appellate court would not have to decide the same issues more than once.

/s/ James McGirr Kelly
U.S.D.J.

DATED: July 21, 1987

ENTERED: 7-22-87
CLERK OF COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER NO. 109

(Filed March 4, 1988)

AND NOW, this 3rd day of March, 1988, upon consideration of Proko Industries, Inc. and Owens-Illinois, Inc.'s motion to Amend Pretrial Order No. 88, and the responses filed thereto, it is ORDERED the Paragraph One of Pretrial Order No. 88 be modified as follows:

> The members of the Settlement Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 64, excluding all schools which filed a request to be excluded as of July 21, 1987 from the Settlement Class pursuant to Federal Rule of Civil Procedure 23(c)(2). A list of all schools and school districts whose request for exclusion from the Settlement Class was postmarked on or before July 21, 1987 is attached hereto as Attachment "1".

The list of schools and school districts attached hereto and identified as attachment "1" is the complete and final list of all schools and school districts that have opted out of the Settlement Class as of July 21, 1987.

BY THE COURT:

/s/ James Kelly
JAMES McGIRR KELLY, J.

ENTERED: 3-4-88
CLERK OF COURT

ATTACHMENT "1"

Asbestos School Litigation

Alphabetical listing with addresses
of all schools and school districts that have
opted out of the settlement class as of July 21, 1987.

Airport Community Schools
1335 Carleton South Rockwood Road
Monroe, MI 48117

AJO Unified School District #15
P.O. Box 68
AJO, AZ 85321

Akiva Hebrew Day School
27700 Southfield Road
Lathrup Village, MI 48076

Akron City School District
70 North Broadway
Akron, OH 44308

Albion Public Schools, Calhoun & Jackson Counties
401 East Michigan Avenue
Albion, MI 49224

Algonac Community Schools, St. Clair County
1216 St. Claire Blvd.
Algonac, MI 48001

All Saints School, Archdiocese of Portland
601 NE 39th Avenue
Portland, OR 97232

Allen Park Public Schools
19001 Champaign Road
Allen Park, MI 48101

Almont Community Schools
401 Church Street
Almont, MI 48003

Alta-Dutch Flat Elementary School
Alta-Dutch Flat Union School District
P.O. Box 958
Alta, CA 95701

Alton Community Unit District #11
1854 East Broadway
Alton, IL 62002

Ann Arbor Public Schools
2555 State Street
Ann Arbor, MI 48104

Arkansas City Unified School District #470
119 W. Washington
P.O. Box 1028
Arkansas City, KS 67005

Arlington Heights School District #25
301 West South Street
Arlington Hts., IL 60005

Arnold Christian Academy of New Covenant Church
at Arnold
804 Windsor Road
Arnold, MD 21012

Atherton Community Schools
3354 South Genesee Road
Atherton, MI 48519

Atkinson County School System
P.O. Box 608
Pearson, GA 31642

Attalla City Schools
101 Case Avenue
Attalla, AL 35954

Aurora East Public School District #131
417 5th Street
Aurora, IL 60505

Austwell Tivoli Independent School District
P.O. Drawer B
Tivoli, TX 77990

Avondale School District, Oakland County
2950 Waukegan
Auburn Heights, MI 48057

Backus Independent School District #114
P.O. Box 47
Backus, MN 56435

Bad Axe Public Schools, Huron County
760 South Van Dyke Road
Bad Axe, MI 48413

Bagdad Unified School District #20
P.O. Box 427
Bagdad, AZ 86321

Bangor Public Schools, Van Buren County
801 West Arlington Road
Bangor, MI 49013

Bedford Public Schools
1575 W. Temperance Road
Temperance, MI 48182

Beecher Community School District
1020 West Coldwater Road
Flint, MI 48505

Benton Harbor Area Schools, Berrion County
711 E. Britain Avenue
P.O. Box 1107
Benton Harbor, MI 49022

Berean Baptist School
10250 North Freeway
Houston, TX 77037

Bethel Christian School
571 Goodale Road
Jefferson, OH 44047

Bethlehem Baptist Church and Academy
4601 West Ox Road
Fairfax, VA 22030

Bishop Consolidated Ind. School District
P.O. Box 39
Bishop, TX 78343

Bloomfield Hills School District
4175 Andover Road
P.O. Box 816
Bloomfield Hills, MI 48013

Blue Sky Schools
P.O. Box 129
Rudyard, MT 59540

Board of Education of Anne Arundel County
2644 Riva Road
Annapolis, MD 21401

Board of Education of Baltimore County
6701 N. Charles Street
Towson, MD 21204

Board of Education of the City of Chicago
1819 West Pershing Road
Chicago, IL 60609

The Board of Education of the City School
District of the City of New York
110 Livingston Street
Brooklyn, NY

The Board of Education of Township High School
District No. 211
Cook County
1750 South Roselle Road
Palatine, IL 60067

Bond County Community Unit School District #2
1008 North Hena
Greenville, IL 62246

Boulder Junction School District
P.O. Box 120
Manitowsh Wtr., WI 54545

BPC Day School (Black Pine Circle)
2027 7th Street
Berkeley, CA 94710

Brandon Heights Christian School
1118 N. Parsons Avenue
Brandon, FL 33511

Brazosport Independent School District
P.O. Drawer Z
Freeport, TX 77541

Bridgeport-Spaulding Community School District,
Saginaw County
3878 Sherman Street
Bridgeport, MI 48722

Bristow Independent School District, Creek County
134 West Ninth Street
Bristow, OK 74010

Brittan Elementary School District - Brittan
School District
2340 Pepper Street
Sutter, CA 95982

Brookside School
P.O. Box 801
Bloomfield Hills, MI 48013

Buchanan Community Schools, Berrier County
400 W. Chicago Street
Buchanan, MI 49107

Caledonia Community Schools
Kent, Allegan & Barry Counties
203 Main Street
Caledonia, MI 49316

Calvery Lutheran School
3420 SW Cloverdale Street
Seattle, WA 98126

Central Baptist Church - Kings's Way Christian Academy
199 East Corning Road
Corning, NY 14830

Central Catholic High School
2401 SE Stark Street
Portland, OR 97214

Central Christian School
P.O. Box 865
Chambersburg, PA 17201

Charleston County School District
2100 Leeds Street
Charleston, SC 29405

Charlotte Public Schools, Easton County
378 State Street
Charlotte, MI 48813

Cheboygan Area Schools, Cheboygan County
520 N. Main Street
P.O. Box 100
Cheboygan, MI 49712

Children's House of Norman, Inc.
606 South Sante Fe
Norman, OK 73069

Christ the King Christian School
1393 Community Park Drive
Columbus, OH 43229

Christ the King School
7414 SE Michael Drive
Milwaukie, OR 97222

Chugach School District
P.O. Box 638
Whittier, AK 99693

Cincinnati Board of Education (Cincinnati City School District)
230 East Ninth Street
Cincinnati, OH 45202

Clarenceville School District
20210 Middlebelt Road
Livonia, MI 48152

Clark County Christian School
3005 Cedar Avenue
Las Vegas, NV 89101

Clear Fork Valley Local Schools
State Rt. 97
R. Route #3
Bellville, OH 44813

Colo Community School District
Highway 30 & West Street
P.O. Box 136
Colo, IA 50056

Coloma Community Schools, Berrien & Van Buren Counties
P.O. Box 550
Coloma, MI 49038

Colorado City Unified School District #14
50 North Colvin Street
Colorado City, AZ 86021

Columbus Christian School
1850 Bostwick Avenue
Columbus, OH 43227

Community Consolidated School District #65
1314 Ridge Avenue
Evanston, IL 60201

Community Consolidated School District #21
999 West Dundee Road
Wheeling, IL 60090

Community Consolidated School District #15, Palatine
505 S. Questin Road
Palatine, IL 60067

Community High School District #218
10701 South Kilpatrick Ave.
Oak Lawn, IL 60453

Comstock Public Schools, Kalamazoo County
301 N. 26th Street
P.O. Box 369
Comstock, MI 49041

Consolidated High School District #230
111 Street & Roberts Road
Palos Hills, IL 60465

Continental School District #39
1991 E. Madera Canyon Road
HC Box 469C
Tumacacori, AZ 85645

Cook County SD #130
12300 S. Greenwood Avenue
Blue Island, IL 60406

Cranbrook Educational Community
P.O. Box 801
Bloomfield Hills, MI 48013

Cranbrook Kingswood School
P.O. Box 801
Bloomfield Hills, MI 48013

Cranbrook Schools
P.O. Box 801
Bloomfield Hills, MI 48013

Crawfordsville School District
P.O. Box 47
Crawfordsville, AR 72327

Crown of Life Evangelical Lutheran School
1282 Tally Ho Trail
Hubertus, WI 53033

Cypress Fairbanks Independent School District
P.O. Box 692003
Houston, Tx 77269-2003

Daviess County Public Schools
P.O. Box 1510
Owensboro, KY 42302-1510

Davis Public Schools 1-10
400 East Atlanta Street
Davis, OK 73030

Davison Community Schools, Genesee & Lapeer Counties
615 East Clark Street
Davison, MI 48423

DeKalb Unit District #428
145 Fisk Avenue
DeKalb, IL 60115

Delaware Christian School
45 Belle Avenue
Delaware, OH 43015

Dell Rapids School District 49-3
1216 North Garfield Street
Dell Rapids, SD 57022

Department of Education of the City of Baltimore
by and through the Mayor and City Council
of Baltimore, a Municipal Corp.
c/o Carl E. Tuerk, Jr., Esquire
COOPER, BECKMAN & TUERK
7th Floor
114 E. Lexington Street
Baltimore, MD 21202

Detroit Public Schools
5057 Woodward Avenue
Detroit, MI 48202

Divine Redeemer School
901 North Logan Avenue
Colorado Springs, CO 80909

Dowagiac Union Schools
701 West Prairie Run
Dowagiac, MI 49047

Dowagiac Union School District, Cass, Van Buren
& Berrien Counties
206 Main Street
Dowagiac, MI 49047

Downers Grove District #99
1890 63rd Street
Downers Grove, IL 60516

Downers Grove Elementary School District #58
1860 63rd Street
Downers Grove, IL 60516

Durand Area Schools, Shiawassee & Genesee Counties
310 North Saginaw Street
Durand, MI 48429

Eastern Lancaster County School District
101 East Main Street
New Holland, PA 17557

Elmhurst Unit District #205
145 Arthur Street
Elmhurst, IL 60126

Episcopal High School
1200 North Quaker Lane
Alexandria, VA 22302

Eureka Christian School
1300 California Street
Eureka, CA 95502

Evanston Township High School District #202
1600 Dodge Avenue
Evanston, IL 60204

Evergreen Park School District #124
9400 South Sawyer Avenue
Chicago, IL 60642

Fairmont Public School District #18
P.O. Box 228
Fairmont, ND 58030

Faith Christian School
7500 Lovejoy Road
Byron, MI 48418

Faith Mennonite High School, Pequea Valley School District
RD #1, Box 299-H
5085 Woodland Drive
Kinzers, PA 17535-9783

Fallon Seventh-Day Adventist Church School
380 East Front Street
Fallon, NV 89406

Fellowship Baptist Church
Granite Christian Academy
Rt. 2, Box 533
Wytheville, VA 24382

Fenton Area Public Schools
3100 Owen Road
Fenton, MI 48430

Flushing Christian Day School
158-15 Oak Avenue
Flushing, NY 11358

Forest Hills School District
6590 Cascade Road
Grand Rapids, MI 49506

Forest Lake Christian School
12515 Combie Road
Auburn, CA 95603

Fort Knox Community Schools
Building 7474
Mississippi Street
Fort Knox, KY 40121-5000

Franklin Academy
2806 Ruffner Road
Birmingham, AL 35210

Glen Rock Public Schools
620 Harristown Road
Glen Rock, NJ 07452

Glenview Community Consolidated School District #34
1401 Greenwood Road
Glenview, IL 60025

Glenwood Community School District
116 South Walnut Street
Glenwood, IA 51534

Gordon County School System
P.O. Box 127
Calhoun, GA 30701

Gore School District
37180 Gore Drive
Lebanon, OR 97355

Grace Christian Academy, School District #5
P.O. Box 471
Orangeburg, SC 29115

Grand Blanc Community Schools
11920 S. Sanginaw Road
Grand Blanc, MI 48439

Grand Ledge Public Schools, Eaton, Clinton
& Ionia Counties
1020 Jenne Street
Grand Ledge, MI 48837

Grandview R-2 School District
11470 Highway C
Hillsboro, MO 63050

Grandview-Hopkins ISD
Route 1, Box
Groom, TX 79039

Greater Fall River Vocational School District
Diman Regional Vocational Technical High School
Stonehaven Road
Fall River, MA 02723

Hackberry Elementary School District #3
P.O. Box 22
Hackberry, AZ 86411

Hammon Public School District I-66
P.O. Box 279
Hammon, OK 73650

Harper School District #66
2987 Harper/Westfall Road
P.O. Box 800
Harper, OR 97906

Hawley Independent School District
P.O. Box D
Hawley, TX 79525

Hephzibah Wesleyan Academy - Bibb County
4123 Forsyth Road
P.O. Box 2424
Macon, GA 31203

High Point Academy
1720 Kinneloa Canyon Road
Pasadena, CA 91107

Holt Public Schools, Ingham & Eaton Counties
4610 Spahr Avenue
Holt, MI 48842

Holton Public Schools
8897 Holton Duck Lake Road
P.O. Box 159
Holton, MI 49425

Holy Cross Lutheran School
1018 North Dellrose
Wichita, KS 67208

Holy Cross School, Archdiocese of Portland in Oregon
5202 N. Bowdoin
Portland, OR 97203

Holy Family Elementary School (Portland Archdiocese)
7425 SE 39th Street
Portland, Or 97202

Holy Family School
121 South Monmouth Street
Dayton, OH 45403

Holy Nativity Episcopal Grade School, Bay County
1005 Second Plaza
Panama City, FL 32401

Holy Trinity School, Portland Archdiocese,
Beaverton School District
13755 SW Walker Road
Beaverton, OR 97005

Homer Community School District, Calhoun,
Jackson, Hillsdale & Branch Counties
403 S. Hillsdale Street
Homer, MI 49245

House of the Lord Christian School
8000 Daffin Lane
P.O. Box 15907
Austin, TX 78761

Ida Public Schools
3145 Prairie Street
Ida, MI 48140

Immaculate Conception School, Archdiocese
of Washington
711 N Street NW
Washington, DC 20001

Immanuel Lutheran School
10th and North Lincoln Street
Bay City, MI 48708

Independent School District #16
8000 Highway 65 NE
Minneapolis, MN 55432

Independent School District No. 622
2055 East Larpenteur Avenue North
St. Paul, MN 55109

J Sterling Morton HSD #201
2423 South Austin Boulevard
Cicero, IL 60650

Jackson School District #324
1128 North Highway
Jackson, MN 56143

Jesuit High School
9000 SW Beaverton Highway
Portland, OR 97225

Joliet Public Elementary School District #86
420 North Raynor Avenue
Joliet, IL 60435

Kearsley Community Schools
G-4396 Underhill Drive
Flint, MI 48506

Kennebec Valley Christian School
P.O. Box 704
Waterville, ME 04901

Kingston Korner School
4418 Kingston Pike
Knoxville, TN 37919

Kingswood School for Girls
P.O. Box 801
Bloomfield Hills, MI 48013

Kirksville Bible School
1702 North Elson Street
Kirksville, MO 63501

Knoxville's Young Set School
2525 Merchants Road
Knoxville, TN 37919

Kralltown Mennonite School
RD 1, Box 530
East Berlin, PA 17316

La Paz School
6015 Mauritania Avenue
Oakland, CA 94605

Lafayette County School District
P.O. Box 110
Oxford, MS 38655

Lake Fenton Community Schools
11428 Torrey Road
Fenton, MI 48430

Lake Forest Elementary School District #67
95 West Deerpath Road
Lake Forest, IL 60045

Lake Mills Area Schools
209 Church Street
Lake Mills, WI 53551

Lake Orion Community Schools
315 North Lapeer Street
Lake Orion, MI 48035

Lakeshore Public Schools, Berrien County
5771 Cleveland Avenue
Stevensville, MI 49127

Lakeville Community Schools
G-11107 Washburn Road
Otisville, MI 48463

Lamphere Schools
31201 Dorchester
Madison Heights, MI 48071

Lan-Chester Christian Schools
1400 Olive Street
Coatesville, PA 19320

Landon School Corp.
6101 Wilson Lane
Bethesda, MD 20817

Lansing Public Schools
2800 Chamberlain Drive
Lansing, MI 48912

Le Sueur Public Schools
901 East Ferry Street
Le Sueur, MN 56058

Lenawee Intermediate School District, Lenawee County
4107 N. Adrian Highway
Adrian, MI 49221

Linden Community Schools
202 South Bridge Street
Linden, MI 48451

Little Red School House
531 Vanosdale
Knoxville, TN 37919

Littlestown Area School District
Maple Avenue
Littlestown, PA 17340

Long Lake Central School District
School Street
Long Lake, NY 12847

Lorraine Unified School District 328
P.O. Box 109
Lorraine, KS 67459-0109

Los Gatos-Saratoga Union HSD
17421 Farley Road W.
Los Gatos, CA 95030-3396

Lowell Area Schools 41-170
12685 Foreman Road
Lowell, MI 49331

Lowndes Co. Board of Ed., Lowndes County
School System
1106 N. St. Augustine Road
P.O. Box 1227
Valdosta, GA 31603

Madeleine School, Archdiocese of Portland
3240 NE 23rd Avenue
Portland, OR 97212

Madison District Public Schools
25421 Alger
Madison Heights, MI 48071

Mancelona Public School District, Antrim & Kalkaska Counties
112 St. John's Street
P.O. Box 739
Mancelona, MI 49659

Maranatha Christian School
4663 Trabue Road
Columbus, OH 43228

Marengo Co Board of Ed.
P.O. Box 398
Lindend, AL 36748

Marion City Board of Ed.
P.O. Box 960
Marion, AL 36756

Marion City Schools
910 East Church Street
Marion, OH 43302

Marist High School, Archdiocese of Portland in Oregan
1900 Kingsley Road
Eugene, OR 97401

Marshall Public Schools, Calhoun County
100 E. Green Street
Marshall, MI 49068

Mason Public Schools, Ingham County
118 West Oak Street
Mason, MI 48854

Medinah Elementary School District #11
700 E. Granville Avenue
Roselle, IL 60172

Memphis University School
6191 Park Avenue
Memphis, TN 38119-5399

Middle Township Public Schools
216 South Main Street
Cape May Courthouse, NJ 08210

Middletown City School District
1515 Girard Avenue
Middletown, OH 45044

Midland School District 27-2
P.O. Box 226
Midland, SD 57552

Millington Community School District, Tuscola & Genesee Counties
8655 Gleason Street
Millington, MI 48746

Monroe Public Schools
1275 North Macomb Street
Monroe, MI 48161

Morenci Area Schools, Lenawee County
500 Page Street
Morenci, MI 49256

Mountain Home SDA School
Route 7, Box 419
Mountain Home, AR 72653

Mount Calvery Lutheran School
666 Rivard Boulevard
Grosse Pointe, MI 48230

Nederland Ind. School District
220 17th Street
Nederland, TX 77627

Neelyville R-4 School District
P.O. Box 8
Neelyville, MO 63954

New Covenant Christian School
900 S. Fifth Avenue
Lebanon, PA 17042

Nixon Smiley C.I.S.D.
P.O. Box 400
Nixon, TX 78140

Nogales Unified School District No. One
222 Plum Street
Nogales, AZ 85621

North Chicago Elementary School District #124
2000 Lewis Avenue
North Chicago, IL 60064

North Kansas City School District 74
2000 NE 46th Street
Kansas City, MO 64116

North Miami Community Schools
P.O. Box 218
Denver, IN 46926

Northfield Township High S D 225
1835 Landwehr Road
Glenview, IL 60025

Norwood Fontbonne Academy
School District of Philadelphia
8891 Germantown Avenue
Philadelphia, PA 19118

O'Hara Catholic School
715 West 18th Street
Eugene, OR 97402

Oak Park - River Forest SD 200
201 N. Scoville Avenue
Oak Park, IL 60302

Oak Park School District
13900 Granzon Avenue
Oak Park, MI 48237

Okemos Public Schools, Ingham County
4406 Okemos Road
Okemos, MI 48864

Old Brethern Christian School
68064 County Rd 11
Nappanee, IN 46550

Orange Southwest SU
P.O. Box 250
Randolph, VT 05060

Our Lady of Fatima School
630 First Street South
Birmingham, AL 35205

Our Lady of Sorrows School, Archdiocese of Portland in Oregon
5239 SE Woodstock Boulevard
Portland, OR 97206

Our Lady of the Lake School
716 A Avenue
Lake Oswego, OR 97034

Our Savior Lutheran School
P.O. Box 938
Bylas, AZ 85530

Our Savior Lutheran School
991 Skyline Drive
Freeport, IL 61032

Ozark Christian Academy - Springdale
1801 S. West End Street
Springdale, AZ 72764

Pantego Christian Academy
2201 West Park Row
Arlington, TX 76013

Paradise Christian School
6013 Paradise Boulevard NW
Albuquerque, NM 87114

Paradise Christian School
5850 Clark Road
Paradise, CA 95969

Park River School District #78
P.O. Box 240
Park River, ND 58270

Parkersburg Community School District
610 Johnson Road
Parkersburg, IA 50665

Parkin School District
P.O. Box 8617
Parkin, AR 72373

Pennfield Schools, Calhoun & Barry Counties
8587 Q Drive North
Battle Creek, MI 49017

Perrine Baptist Academy
16905 SW 90th Avenue
Miami, FL 33157

Pike County Board of Ed.
P.O. Box 3097
Pikeville, KY 41501

Pikeland Community Unit School District #10
219 W. Adams
P.O. Box 515
Pittsfield, IL 62363

Pioneer Christian Academy
4479 Jackson Road
Whites Creek, TN 37189

Placer Hills Union SD
P.O. Box 68
Meadow Vista, CA 95722

Plainfield Community Consolidated
School District No. 202
Will and Kendall Counties
601 Plaza Drive
Plainfield, IL 60544

Pomerene Elementary School District #64
P.O. Box 7
Pomerene, AZ 85627

Pontotoc Separate School District
132 North Main Street
Pontotoc, MS 38863

Porcupine School
531 Fifth Street
Juneau, AK 99801

Portage Community School District
904 DeWitt Street
Portage, WI 53901

Pottawatomie West Unified SD #323
201 S. 3rd Street
Westmoreland, KS 66549

Poughkeepsie SDA School
71 Mitchell Avenue
Poughkeepsie, NY 12603

Prince Avenue Baptist Christian School
595 Prince Avenue
P.O. Box 1149
Athens, GA 30603

Quantico Dependents' School System
MCDEC Building 3307
Quantico, VA 22134-5005

Randolph Field Ind. School District
P.O. Box 2217
Universal City, TX 78148

Red Bank Reg. High School Board of Ed.
101 Ridge Road
Little Silver, NJ 07739

Reeths-Puffer Schools, Muskegon County
991 West Giles Road
Muskegon, MI 49445

Regis High School (Archidocese
of Portland in Oregon)
550 West Regis Street
Stayton, OR 97383

Roeper City and Country School
P.O. Box 329
Bloomfield Hills, MI 48013

Rose Hill Christian School
1001 Winslow Road
Ashland, KY 41101

Russellville City Schools
7th & Summer Streets
Russellville, KY 42276

Sacred Heart School
3822 SE 11th Avenue
Portland, OR 97202

Sacred Heart School, Archdiocese of Portland in Oregon
431 South Ivy Street
Medford, OR 97501

Saginaw Twp. Community Schools, Saginaw County
3465 N. Center Road
P.O. Box 6278
Saginaw, MI 48608

Sand Creek Community Schools, Lenawee County
6850 Sand Creek Highway
Sand Creek, MI 49279

Sandusky Community Schools
395 South Sandusky Road
Sandusky, MI 48471

School City of Hobart
32 E. 7th Street
Hobart, IN 46342

School District of the City of Adrian, Lenawee County
159 E. Maumee Street
Adrian, MI 49221

School District of the City of East Detroit
19200 Stephens
East Detroit, MI 48021

School District of the City of Ferndale
725 Pinecrest
Ferndale, MI 48220

School District of the City of Flint
923 Kearsley Street
Flint, MI 48502

School District of the City of Royal Oak
1123 Lexington Boulevard
Royal Oak, MI 48073

School District of the City of Saginaw
550 Millard Street
Saginaw, MI 48607

School of St. Peter
410 Ring Avenue North
Canby, MN 56220

Skokie School District #69
5100 Madison Street
Skokie, IL 60077

Smithton Community Con. School District 130
P.O. Box 218
Smithton, IL 62285

South Hadley Public Schools
116 Main Street
South Hadley, MA 01075

South Haven Public Schools
554 Green Street
South Haven, MI 49090

South Tama County Community School District
1702 Harding Street
Tama, IA 52339

Southbridge Public Schools
Town Hall
P.O. Box 665
Southbridge, MA 01550

Southern Tier SDA Church School (of the NY Conference of Seventh-Day Adventist School System)
Bunn Hill Road, Box 43
RD 7
Binghamton, NY 13903

Southwestern Christian School
482 'L' Street
Chula Vista, CA 92011

St Agatha School, Archdiocese of Portland, Oregon
1516 SE Miller Street
Portland, OR 97202

St Anthony School
12645 SW Pacific Highway
Tigard, OR 97223

St. Anthony School 23J
12645 SW Pacific Highway
Tigard, OR 97223

St Augustine School, Barberton School District
195 7th Street NW
Barberton, OH 44203

St Catherine of Siena School
Routes 72 and 31
Dundee, IL 60118

St. Charles Borromeo School
3100 West Parnell Avenue
Milwaukee, WI 53221

St. Charles Parish Public Schools
P.O. Box 46
Luling, LA 70070

St. Clare School, Archdiocese of Portland in Oregon
1807 SW Freeman
Portland, OR 97219

St. Elizabeth Seton School
2760-52 Terrace SW
Naples, FL 33999

St. Francis of Assisi School
1131 SE Oak Street
Portland, OR 97214

St. Ignatius School, in the Archdiocese
of Portland in Oregon
3330 SE 43rd Avenue
Portland, OR 97206

St. Isidore Elementary School - East Baton Rouge Parish
Rt. 7, Box 182A
Baton Rouge, LA 70807

St. John Fisher School (Archdiocese of Portland, Oregon)
7101 SW 46th Avenue
Portland, OR 97219

St. John's Episcopal School
848 Harter Road
Dallas, TX 75218

St. John's Lutheran School
509 S. Mattis Avenue
Champaign, IL 61821

St. Johns Public Schools, Clinton & Gratiot Counties
501 West Sickles
P.O. Box 230
Saint Johns, MI 48879

St. Joseph Public Schools, Berrien County
2214 South State Street
St. Joseph, MI 49085

St. Joseph School
930 Lake Street
Kalamazoo, MI 49001

St. Joseph School
130 North Fifth Avenue
Sturgeon Bay, WI 54235

St. Joseph School - Roseburg District #4
630 West Stanton
Roseburg, OR 97470

St. Joseph's Episcopal School - Diocese of Southeast Florida
3300 S. Seacrest Boulevard
P.O. Box 550
Boynton Beach, FL 33425

St. Louis Public Schools, Gratiot, Midland & Isabella Counties
113 E. Saginaw Street
St. Louis, MI 48880

St. Mark Lutheran School
3930 S. 19th Street
Lincoln, NE 68502

St. Luke's Episcopal Day School
P.O. Box 1117
Hot Springs, AR 71902

St. Lukes School, Archdiocese of Portland
529 Harrison Street
Woodburn, OR 97071

Benedictine Sisters of St. Martin's Academy
St. Martin's Academy - Black Hills
Rt. 4, Box 1660
Rapid City, SD 57702

St. Mary Catholic School
609 Tenth Street
Beaver Falls, PA 15010

St. Mary of the Valley High School
4440 SW 148th Avenue
Beaverton, OR 97007

St. Mary of the Valley Grade School
4440 SW 148th Avenue
Beaverton, OR 97007

St. Mary School, Diocese of Green Bay
2109 Marshall Street
Manitowoc, WI 54220

St. Mary's Academy
1615 SW Fifth Avenue
Portland, OR 97201

St. Marys High School, Archdiocese of Portland
816 Black Oak Drive
Medford, OR 97504

St. Mary's School
815 SW Broadalbin Street
Albany, OR 97321

St. Matthew's School, Archdiocese of Portland in Oregon
221 SE Walnut Street
Hillsboro, OR 97123

St. Paul Catholic School 4J
1201 Satre Street
Eugene, OR 97401

St. Paul Lutheran Church and School
701 Washington Street
Grafton, WI 53024

St. Paul Lutheran School
Box 158
Freeman, SD 57029

St. Paul's Lutheran Church
322 E. Stewart Avenue
Columbus, OH 43206

St. Paul Parochial School
Box 188
St. Paul, OR 97137

St. Pius IV Catholic School
1470 W. 13th Street
Jacksonville, FL 32209

St. Pius X School - Portland Catholic Archdiocese
1260 NW Saltzman Road
Portland, OR 97229

St. Stephen's Elementary School
4235 SE Salmon
Portland, OR 97215

St. Sylvester Central Grade School
Wayne Street
Woodsfield, OH 43793

St. Teresa School - Glennonville, MO
Route 1 - Box 369
Campbell, MO 63933

St. Therese School
1260 NE 132nd Avenue
Portland, OR 97230

St. Vincent Academy
228 West Market Street
Newark, NJ 07103

St. Vincent de Paul School (24-J)
1015 Columbia Street NE
Salem, OR 97303

Star of the Sea School, Archdiocese of Portland, Oregon
1411 Grand Avenue
Astoria, OR 97103

Starkweather School District 44
P.O. Box 45
Starkweather, ND 58377

Sussex Co. Voc. High School District
105 N. Church Road
Sparta, NJ 07871

Teague Ind. School District
400 Main Street
Teague, TX 75860

Teutopolis Community Unit SD 50
P.O. Box 246
Teutopolis, IL 62467

The City of Boston, The Boston School Committee, et al.
Boston City Hall, Room 615
Boston, MA 02201

The Living Word Christian School, Inc.
Box 48
Roggen, CO 80652

The School at Jemicy Farm, Inc.
11 Celadon Road
Baltimore, MD 21117

The School District of Kansas City, Missouri
1211 McGee Street
Kansas City, MO 64106

The Stanford School
19315 NE 95th Street
Redmond, WA 98053

The Valley Christian School, Inc.
58 Pomeroy Terrace, P.O. Box 787
Northampton, MA 01060

Three Rivers Community Schools, St. Joseph & Cass Counties
207 E. Michigan Avenue
Three Rivers, MI 49093

Tinley Park Cons. School District #146
17316 South Oak Park Avenue
Tinley Park, IL 60477

Tipton Community School
400 East 6th Street
Tipton, IA 52772

Township High School District 214
799 W. Kensington Road
Mt. Prospect, IL 60056

Traverse City Area Public Schools
Grand Traverse, Leelanau and Benzie Counties
P.O. Box 32
Traverse City, MI 49685

Tri-County School Corp. of Benton,
Jasper and White Counties
200 W. North Street
RR 2, Box 73A
Wolcott, IN 47995-9516

Unified School District No. 501, Shawnee County
624 SW 24th
Topeka, KS 66611

Union Public Schools
5656 South 129 East Avenue
Tulsa, OK 74134

United Community School District
Rural Route 1
Boone, IA 50036

University School of Nashville
2000 Edgehill Avenue
Nashville, TN 37212

Upward SDA School
Route 2, Box A, Flat Rock
Flat Rock, NC 28731

Utica Community Schools, Macomb County
51041 Shelby Road
Utica, MI 48087

Van Buren Public Schools
555 West Columbia Avenue
Belleville, MI 48111

Visitation School, Archdiocese of Portland in Oregon
Route 2 - Box 221
Forest Grove, OR 97116

Warren Consolidated Schools, Macomb County
31300 Anita Drive
Warren, MI 48093

Washington Avenue Christian School
200 North Washington Avenue
Greenville, SC 29611

Waterloo Community Schools
1516 Washington Street
Waterloo, IA 50702

Waterloo Local Schools
1464 Industry Road
Atwater, OH 44201

Waukegan Community Unit District #60
1201 N. Sheridan Road
Waukegan, IL 60085

West Bloomfield Schools
3250 Commerce Road
West Bloomfield, MI 48033

West Valley Christian Elementary School
(affiliated with West Valley Nazarene Church)
6115 North 91st Avenue
Glendale, AZ 85305

Willow Rancho Christian Preschool & Elementary School
7238 Cromwell Way
Sacramento, CA 95822

Woodstock Community Unit SD 200
501 West South Street
Woodstock, IL 60098

Wyoming Public Schools, Kent County
3575 Gladiola Avenue SW
Wyoming, MI 49509

Zeeland Public Schools
P.O. Box 110
Zeeland, MI 49464

Zion Lutheran School
1600 Woodlawn Road
Lincoln, IL 62656

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1222

In Re: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURGH SCHOOL DISTRICT

and

NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., et al.

State of Hawaii,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 83-0268)
District Judge: Hon. James McGirr Kelly

Submitted Under Third Circuit Rule 12(6)
Before: GIBBONS, *Chief Judge*, SEITZ, *Circuit Judge*
and FARNAN, *District Judge**

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*Hon. Joseph J. Farnan, United States District Judge for the District of Delaware, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on September 29, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered July 22, 1987 be and the same is hereby affirmed.

Costs are taxed against appellant.

Attest:

/s/ Sally Marvos
Clerk

OCT 17 1988

Certified as a true copy and issued in lieu of a formal mandate on December 20, 1988

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

[Judgment entered October 17, 1988]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1222

In re: School Asbestos Litigation
School District of Lancaster, et al.,
v.
Lake Asbestos of Quebec, Ltd., et al.
State of Hawaii,
Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, AND COWEN, *Circuit Judges*, and FARNAN, *District Judge**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

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*Judge Farnan as to panel rehearing only.

having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ John J. Gibbons
Chief Judge

Dated: December 12, 1988

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 83-0268

SECOND AMENDED COMPLAINT

CLASS ACTION

JURY TRIAL DEMANDED

SCHOOL DISTRICT OF LANCASTER
225 West Orange Street
Lancaster, PA 17603

MANHEIM TOWNSHIP SCHOOL DISTRICT
School Road
Lancaster, PA 17601

and

LAMPETER-STRASBURG SCHOOL DISTRICT
Lampeter, PA 17537

Plaintiffs,

v.

LAKE ASBESTOS OF QUEBEC, LTD.
c/o Corporation Trust Company
100 West Tenth Street
Wilmington, DE 19801

THE CELOTEX CORPORATION
1500 N. Dale Mabry Highway
Tampa, FL 33607

RAYMARK INDUSTRIES, INC.
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

UNION CARBIDE CORP.,
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

ASBESTOSPRAY CORP.
c/o Secretary of State of New Jersey
Department of State
P.O. Box 1330
Trenton, NJ 08625

SPRAYO-FLAKE COMPANY,
Secretary of State
3rd Floor – Centennial Bldg.
Springfield, IL 62756

NATIONAL GYPSUM CO.,
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA

SPRAYED INSULATION INC.,
c/o Secretary of State of New Jersey
Department of State
P.O. Box 1330
Trenton, NJ 08625

ASBESTOS FIBRES INC.,
c/o Secretary of State of New Jersey
Department of State
P.O. Box 1330
Trenton, NJ 08625

DANA CORP.
4500 Dorr Street
P.O. Box 1000
Toledo, OH 43615

U.S. GYPSUM
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

U.S. MINERAL PRODUCTS CO.,
Furnace Street
Stanhope, NJ 07874

SPRAYON INSULATION & ACOUSTICS, INC.,
c/o E. Kempthorne
1390 South Ocean Boulevard
Pompano Beach, FL 33062

SPRAYON RESEARCH CORP.,
c/o E. Kempthorne
1390 South Ocean Boulevard
Pompano Beach, FL 33062

KEENE CORP.
200 Park Avenue
New York, NY 10017

WORBEN CO., INC.
c/o Doris M. Haynes
3830 Charleston
Houston, TX 77007

WILKIN INSULATION CO.
20 North Wacker Drive
Chicago, IL 60606

W.R. GRACE & CO.
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

OWENS-CORNING FIBERGLAS CORPORATION
c/o C.T. Corporation System
123 S. Broad Street
Philadelphia, PA 19109

STANDARD INSULATIONS, INC.
c/o Iris B. Ryder
410 N. Olive Street
Kansas City, MO 64120

NORTH AMERICAN ASBESTOS CORP.
c/o Herbert C. Brook
115 S. LaSalle Street
Chicago, IL 60603

CASSIAR RESOURCES LTD.
2000 Guiness TWR
1055 West Hastings
Vancouver V6E3V3
British Columbia, Canada

BELL ASBESTOS MINES, LTD.
c/o Societe Nationale de l'Amiante
Thetford Mines,
Quebec, Canada

ASBESTOS CORPORATION LIMITED
1940 Sun Life Building
Montreal, Quebec
H3B24C Canada

SOUTHERN TEXTILE CORP.
c/o Corporation Trust Company
100 W. Tenth Street
Wilmington, DE 19801

OWENS-ILLINOIS, INC.
c/o David A. Ward
One Seagate
Toledo, OH 43666

TURNER & NEWALL LIMITED
20 St. Mary's Parsonage
Manchester M3 2NL England

THE FLINTKOTE CO.
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

FIBREBOARD CORPORATION
c/o United States Corporation Company
306 South State Street
Dover, DE 19901

GAF CORP.
229 South State Street
Dover, DE 19901

UNIROYAL, INC.
Oxford Management and Research Center
Middlebury, CT 06749

CAPE ASBESTOS
P.O. Box 8644
Johannesburg, Tvl. 2000

PFIZER, INC.
c/o C.T. Corporation System
277 Park Avenue
New York, NY 10017

KAISER CEMENT CORPORATION
c/o C.T. Corporation System
800 S. Figueroa Street
Suite 1000
Los Angeles, CA 90017

BES-TEX, INC.
c/o Eugene M. Hannah
1460 Morena Blvd.
San Diego, CA 92110

and

GEORGIA-PACIFIC CORP.
c/o C.T. CORPORATION SYSTEM
2 PEACHTREE STREET, N.W.
ATLANTA, GA 30383

Defendants.

SECOND AMENDED COMPLAINT

1. Plaintiffs, the School District of Lancaster, the Manheim Township School District and the Lampeter-

Strasburg School District, are public school systems organized and existing under the laws of the Commonwealth of Pennsylvania.

2. The plaintiffs have school buildings and facilities in their possession, custody or control which contain friable or easily damaged asbestos products.

3. The defendants (and/or their predecessors in interest) are all corporations, companies or other business entities which have been and/or are now engaged in the mining, manufacturing or supplying of asbestos or asbestos-containing products.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332:

(a) Plaintiffs are citizens of the Commonwealth of Pennsylvania;

(b) Defendant Lake Asbestos of Quebec, Ltd. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business within the Commonwealth of Pennsylvania;

(c) Defendant The Celotex Corporation is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(d) Defendant Raymark Industries, Inc. is a corporation incorporated under the laws of the State of Connecticut and it does not have its principal place of business in Pennsylvania;

(e) Defendant Union Carbide Corp. is a corporation incorporated under the laws of the State of New York and it does not have its principal place of business in Pennsylvania;

(f) Defendant Asbestospray Corp. was a corporation incorporated under the laws of the State of New York and it does/did not have its principal place of business in Pennsylvania;

(g) Defendant Sprayo-Flake Company was a corporation incorporated under the laws of the State of Illinois and it does/did not have its principal place of business in Pennsylvania;

(h) Defendant National Gypsum Co. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(i) Defendant Sprayed Insulation, Inc. was a corporation incorporated under the laws of the State of New Jersey and it does/did not have its principal place of business in Pennsylvania;

(j) Defendant Asbestos Fibres, Inc. was a corporation incorporated under the laws of the State of New Jersey and it did not have its principal place of business in Pennsylvania;

(k) Defendant Dana Corp. is a corporation incorporated under the laws of the Commonwealth of Virginia and it does not have its principal place of business in Pennsylvania;

(l) Defendant U.S. Gypsum is a corporation incorporated under the laws of the State of Delaware and

it does not have its principal place of business in Pennsylvania;

(m) Defendant U.S. Mineral Products is a corporation incorporated under the laws of the State of New Jersey and it does not have its principal place of business in Pennsylvania;

(n) Defendant Sprayon Insulation & Acoustics, Inc. is a corporation incorporated under the laws of the State of New Jersey and it does not have its principal place of business in Pennsylvania;

(o) Defendant Sprayon Research Corp. is a corporation incorporated under the laws of the State of Florida and it does not have its principal place of business in Pennsylvania;

(p) Defendant Keene Corp. is a corporation incorporated under the laws of the State of New York and it does not have its principal place of business in Pennsylvania;

(q) Defendant Worben Co., Inc. was a corporation incorporated under the laws of the State of Texas and it does/did not have its principal place of business in Pennsylvania;

(r) Defendant Wilkin Insulation Co. is a corporation incorporated under the laws of the State of Illinois and it does not have its principal place of business in Pennsylvania;

(s) Defendant W.R. Grace & Co. is a corporation incorporated under the laws of the State of Connecticut and it does not have its principal place of business in Pennsylvania;

(t) Defendant Owens-Corning Fiberglas Corporation is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(u) Defendant Standard Insulations, Inc. is a corporation incorporated under the laws of the State of Missouri and it does not have its principal place of business in Pennsylvania;

(v) Defendant North American Asbestos Corp. was a corporation incorporated under the laws of the State of Illinois and it does/did not have its principal place of business in Pennsylvania;

(w) Defendant Cassiar Resources, Ltd. is a foreign corporation and it does not have its principal place of business in Pennsylvania;

(x) Defendant Bell Asbestos Mines, Ltd. is a foreign corporation and it does not have its principal place of business in Pennsylvania;

(y) Defendant Asbestos Corporation Limited is a foreign corporation and it does not have its principal place of business in Pennsylvania;

(z) Defendant Southern Textile Corp. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(aa) Defendant Owens-Illinois, Inc. is a corporation incorporated under the laws of the State of Ohio and it does not have its principal place of business in Pennsylvania;

(bb) Defendant Turner & Newall Limited is a foreign corporation and it does not have its principal place of business in Pennsylvania;

(cc) Defendant The Flintkote Co. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(dd) Defendant Fibreboard Corporation is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(ee) Defendant GAF Corp. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(ff) Defendant Uniroyal, Inc. is a corporation incorporated under the laws of the State of New Jersey and it does not have its principal place of business in Pennsylvania;

(gg) Defendant Cape Asbestos is a foreign corporation and it does not have its principal place of business in Pennsylvania;

(hh) Defendant Pfizer, Inc. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(ii) Defendant Kaiser Cement Corporation is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(jj) Defendant Bes-tex, Inc. is a corporation incorporated under the laws of the State of California and it does not have its principal place of business in Pennsylvania; and

(kk) Defendant Georgia-Pacific Corp. is a corporation incorporated under the laws of the State of Georgia and it does not have its principal place of business in Pennsylvania.

The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000.00).

5. All the plaintiffs herein reside in the Eastern District of Pennsylvania.

DEFINITION SECTION

6. As used herein, "friable asbestos", "friable asbestos-containing material", and "friable asbestos-containing products" means any asbestos-containing material applied onto ceilings, walls, structural members, piping, ductwork, or any other part of the building structure which, when dry, may be crumbled, pulverized, reduced to powder by hand pressure, or which is otherwise easily damaged.

CLASS ACTION ALLEGATIONS

7. Plaintiffs bring this action as a class action pursuant to Rule 23, Fed. R. Civ. P., on behalf of themselves and a class of persons similarly situated.

8. The class is defined herein, as follows: all entities which own or operate in whole or in part any public educational facilities, as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2854, throughout the United States; and all entities which own or operate in whole or in part any non-public, non-profit elementary or secondary educational facilities, including entities with religious affiliations, in the United States, to the extent that such non-profit entities are owned or operated by one or more non-profit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual. This action is appropriate for treatment as a class action for the reasons stated in paragraphs 9 through 14, inclusive, *infra*.

9. The class is sufficiently numerous that joinder of all members is impracticable insofar as, upon information and belief, the class is comprised of approximately 35,000 public and private school entities throughout the United States.

10. Plaintiffs will fairly and adequately protect the interests of the class. The interests of the class representatives are coincident with, and not antagonistic to, those of the remainder of the class. In addition, plaintiffs are represented by experienced and able counsel who have previously litigated class action and hazardous materials cases.

11. There are questions of law and fact common to the class. These questions include, among others, the liability of defendants for mining, manufacturing, producing, selling or distributing asbestos for use in "friable

asbestos-containing products" in buildings; the effect and applicability of various federal statutory and regulatory mandates, including, *inter alia*, Environmental Protection Agency regulations, the Toxic Substance Control Act, 15 U.S.C. § 2605, *et seq.*, the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, and the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3601, *et seq.*; the resultant damages, injuries, harm and physical harm incurred by members of the class, and the appropriate amount of punitive damages to be awarded.

12. Defendants have acted to create unreasonable risks of harm on grounds and in a manner generally applicable to the class, and have refused to take remedial actions to redress the wrongs inflicted upon the class, thereby making appropriate final injunctive relief and/or corresponding declaratory relief.

13. (a) The questions of law and fact common to the members of the class predominate over any questions affecting individual members.

(b) Class treatment is a superior method for the fair and efficient adjudication of the issues in dispute because it permits a large number of injured parties, joinder of whom is impracticable, to prosecute their common claims in a single forum simultaneously. The class action provides an efficient method whereby the relative rights of the plaintiffs, class members and the defendants can be fairly managed.

14. The prosecution of a multitude of separate actions by individual members of the class may create a risk of adjudications with respect to individual members

of the class which as a practical matter might affect their ability to obtain compensatory or equitable relief.

SUBSTANTIVE ALLEGATIONS

15. Asbestos is a known human carcinogen. Extensive epidemiological evidence demonstrates that inhalation of asbestos can lead to mesothelioma, a diffuse cancer which spreads over the lung surface (pleural) or the surface of stomach lining (peritoneal), lung cancer, asbestosis, and other diseases which are serious, irreversible, and often fatal. There is no known threshold of exposure to asbestos fibers below which exposure to asbestos is safe. Asbestos fibers, if inhaled, in any quantity can cause injury to human tissue and bodily functions, although not all exposures necessarily result in the onset of disease, either immediately or ultimately, because of complex physiological processes of the human body.

16. Asbestos fibers are extremely durable and their size and shape permit them to remain airborne for long periods of time. A disturbance and/or deterioration of friable asbestos-containing products causes the release of asbestos fibers into the air where they may be inhaled by school children and school employees. Thus, the presence of friable asbestos in school buildings results in the contamination of and harm to such property as well as posing serious risk of harm to persons, threatening physical injury and rendering plaintiffs' property unsafe and unreasonably dangerous.

17. Exposure to and inhalation of asbestos causes diseases as referenced in paragraph 15 hereof, which

diseases may begin to develop shortly after first exposure, but which may not manifest themselves through serious physical symptoms, disability and death for a long period of time thereafter.

18. Employees of plaintiffs, school children attending plaintiffs' schools, and others have been exposed and will continue to be exposed to, and have inhaled and will continue to inhale, asbestos fibers on plaintiffs' property, and as a result thereof, upon information and belief, some individuals have suffered actual physical harm in that some individuals have been exposed to asbestos fibers and thereby suffered injury due to inhalation as set forth in paragraph 15, *supra;* and some of these individuals have contracted asbestos-related diseases, and further there is a statistically significant probability and risk that others may contract asbestos-related diseases in the future.

19. The presence of friable asbestos in plaintiffs' schools has resulted in property damage in that the property of plaintiffs has been contaminated and/or rendered unfit for use, in whole or in part, because of the potential of additional individuals being exposed to and inhaling asbestos fibers.

20. Occupational health hazards associated with the inhalation of asbestos fibers were documented in the early 1900's.

21. Members of the asbestos industry sought to suppress, conceal and obscure data on the relationship between asbestos exposure and disease as early as the mid-1930's.

22. The Asbestos Textile Institute, or its successor, the Asbestos Textile Institute, Inc. ("ATI"), an industry association, along with its members, suppressed, discouraged and retarded research and publication concerning the relationship between asbestos and various diseases and actively concealed and misrepresented such relationship at least as early as the 1950's.

23. Members of the asbestos industry, through, *inter alia*, their participation in and funding of the ATI, their funding and control of the Saranac asbestos dust studies during the 1930's, their control over trade publications, and through other agreements, understandings and joint undertakings, cooperated and assisted each other in the suppression and active concealment and misrepresentation of the relationship between asbestos and various diseases as early as the 1930's.

24. Some or all members of the asbestos industry were aware, or should have been aware, of certain studies and data linking asbestos with various diseases and were aware of the acts of suppression, concealment and misrepresentation of the relationship established thereby being perpetrated for their economic benefit, but nevertheless continued to mine, produce, manufacture and sell asbestos and asbestos-containing products without any warnings as to potential health hazards presented by their products.

25. All industry members, including those entering the asbestos industry subsequent to the consummation of agreements, understandings and concert of action among the ATI members, adhered to an industry-wide practice

of refusing to provide necessary warnings as to the hazards presented by exposure to asbestos and asbestos-containing products.

26. Substantial amounts of asbestos have been used in school buildings, beginning as early as 1900 and particularly during the period 1946 through 1972. The application of friable asbestos-containing material was banned by the United States Environmental Protection Agency by December 31, 1978.

27. Defendants mined, manufactured, processed, sold, marketed and placed into the stream of commerce asbestos, and/or friable asbestos-containing products knowing that they would be used primarily for fireproofing, insulation and decorative purposes in public areas of buildings, including educational buildings and facilities.

28. Upon information and belief, in many, if not all instances, it may be impossible to identify the defendant or defendants responsible for the manufacture of the friable asbestos-containing products used in particular educational buildings and facilities.

29. On June 14, 1980, the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3601 *et seq.*, was enacted. Congress found that "the presence in school buildings of friable or easily damaged asbestos creates an unwarranted hazard to the health of the school children and school employees who are exposed to such materials." 20 U.S.C. § 3601(6).

30. On May 27, 1982, the United States Environmental Protection Agency (EPA) issued a rule under Section 6 of the Toxic Substances Control Act, 15 U.S.C. § 2605, at

47 Fed. Reg. 23360 (codified in 40 C.F.R. §763), which requires "local education agencies" (covering both public and nonprofit elementary and secondary schools) to undertake specified tests to identify friable asbestos-containing building materials, and to maintain records and issue warnings and notifications to employees and parent-teacher associations concerning the presence of friable asbestos-containing material in the schools. Except in narrowly limited circumstances, EPA mandated that all schools built before January, 1979 must undertake the expense of this testing program by June 28, 1983, regardless of whether asbestos is ultimately identified as present in those schools. This requirement was imposed as a result of the EPA Administrator's finding of an unreasonable risk of injury to human health, which was based in part on the fact that "[a]sbestos has been responsible for the premature deaths of may persons who worked with the types of insulating materials now found in some schools." 47 Fed. Reg. at 23361. *See also,* 47 Fed. Reg. 25145 (June 10, 1982) [extending the date for compliance from May 27, 1982 to June 28, 1983].

31. Accordingly, the named plaintiffs and other members of the class, also herein collectively referred to as "plaintiffs" or "plaintiff class", have had to and will have to incur the cost of, *inter alia,* inspection, analysis, containment, removal and replacement of friable asbestos-containing products. In particular, the named plaintiffs either have spent or estimate that they will have to spend over $110,000 to undertake necessary testing and corrective measures in their three (3) school districts alone. Members of the class have spent and will spend

many hundreds of millions of dollars on asbestos abatement remedial action to eliminate the unsafe and unreasonably dangerous conditions caused by the presence of friable asbestos-containing products in school buildings.

32. Plaintiffs will be compelled to encapsulate, enclose, remove and/or replace property as a result of that property being contaminated and harmed by the presence of asbestos therein.

COUNT I: NEGLIGENCE

33. Plaintiffs hereby incorporate by reference paragraphs 1-32, inclusive, as if fully set forth herein.

34. At all times material hereto, defendants knew or should have known that asbestos and hence friable asbestos-containing products, in their ordinary and foreseeable uses, would be used for fireproofing, insulation and decorative purposes in public and private schools.

35. At all times material hereto, defendants mined, manufactured, processed, distributed and/or sold asbestos and/or friable asbestos-containing products which defendants knew, or, through the exercise of reasonable care, should have known were inherently dangerous, defective, hazardous, created an unreasonable risk of harm to plaintiffs, posed serious risk of harm to persons, caused personal injury, damaged school buildings and rendered school buildings unsafe and unreasonably dangerous.

36. Defendants failed to warn or to adequately or sufficiently warn, either directly or indirectly, the foreseeable users of the health hazards associated with these materials after installation.

37. Defendants failed to test or adequately test the asbestos and/or friable asbestos-containing products.

38. Defendants failed to represent accurately to the plaintiffs, either directly or indirectly, that asbestos as used in friable asbestos-containing products poses a health hazard and causes personal injury to those exposed to the product and renders schools unsafe and unreasonably dangerous, whereby plaintiffs were induced to purchase and utilize such products.

39. Defendants failed to remove or recommend the removal of friable asbestos-containing products from the market or to undertake the responsibility to test for, remove and replace friable asbestos-containing materials in school buildings and facilities, although they knew or should have known that the presence of the carcinogen asbestos in a readily-releasable form posed a health hazard to plaintiffs and to those entrused to their care and created unsafe and unreasonably dangerous schools.

40. The activities engaged in by the defendants created an unreasonable risk of harm to plaintiffs and were pursuant to a common plan, concert of action and a concerted course of conduct.

41. Defendants' negligence as set forth above directly and proximately caused the harm suffered by plaintiffs including physical harm, whether, *inter alia*, it be the necessity to undertake the EPA-mandated testing

program within the schools, to remove or contain previously identified friable asbestos-containing materials in the schools, or to undertake the expense of removal or containment.

COUNT II: STRICT LIABILITY

42. Plaintiffs hereby incorporate by reference paragraphs 1-41, inclusive, as if fully set forth herein.

43. The defendants mined, manufactured, marketed and/or sold asbestos and/or asbestos-containing products.

44. At the time of the mining, manufacture, processing, and sale of asbestos and asbestos-containing products, defendants knew or had reason to know that asbestos products would be used by the plaintiffs herein, as the ultimate users or consumers.

45. The asbestos in the form of friable asbestos-containing products was sold by defendants in a defective condition unreasonably dangerous to the plaintiffs and was expected to and did reach the users or consumers without substantial change in its original condition.

46. The asbestos and friable asbestos-containing products mined, manufactured, processed, distributed and/or sold by the defendants were defective in that they were incapable of being made safe for their ordinary and intended uses, and defendants failed to provide plaintiffs, either directly or indirectly, with adequate or sufficient warnings regarding the risks and dangers inherent in

exposure to their products, and failed to test or adequately test the asbestos and/or friable asbestos-containing products.

47. The activities engaged in by the defendants were pursuant to a common plan, concert of action and a concerted course of conduct.

48. The ordinary and foreseeable use of asbestos and friable asbestos-containing products for fireproofing, insulation and decorative purposes in public and private schools is inherently dangerous and ultrahazardous.

49. Plaintiffs have suffered harm, including physical harm, as a direct and proximate result of defendants' defective, unsafe and unreasonably dangerous friable asbestos-containing products.

COUNT III: BREACH OF WARRANTIES

50. Plaintiffs hereby incorporate by reference paragraphs 1-49, inclusive, as if fully set forth herein.

51. Defendants failed to represent accurately to the plaintiffs, either directly or indirectly, that asbestos and hence friable asbestos-containing products are dangerous to persons and property and pose a health hazard to those exposed to such materials, whereby plaintiffs were induced to utilize such products.

52. Defendants made implied warranties to the plaintiffs, through the advertising, marketing and labeling of their product, that asbestos and friable asbestos-containing materials were safe for their normal and foreseeable uses, including for fireproofing, insulation and decorative purposes in public and private schools.

53. Defendants breached said warranties to plaintiffs in that asbestos and hence friable asbestos-containing products are inherently dangerous, unfit and unsafe for the ordinary and foreseeable uses of fireproofing, insulation and decorative purposes.

54. The activities engaged in by the defendants were pursuant to a common plan, concert of action and a concerted course of conduct.

55. Plaintiffs, as foreseeable and intended users of defendants' products, relied upon defendants' representations, skill, expertise and judgment in assuming that asbestos and hence friable asbestos-containing materials would not only perform as warranted, but were safe and would not cause plaintiffs to suffer property damage nor endanger the health of those entrusted to their care.

56. As a result of defendants' breach of warranties, plaintiffs were directly and materially harmed and injured.

COUNT IV: CONCERT OF ACTION

57. Plaintiffs hereby incorporate by reference paragraphs 1-56, inclusive, as if fully set forth herein.

58. Defendants acted pursuant to a common plan, concert of action and a concerted course of conduct with respect to the activities referred to in paragraphs 1-57, which activities were performed, *inter alia*, for the benefit of the asbestos industry.

59. Each defendant knew or had reason to know that the conduct of some or all of the other defendants

subjected plaintiffs to an unreasonable risk of harm, constituting numerous breaches of legal duties, and gave substantial assistance or encouragement to such defendants by, *inter alia*, cooperating with, assisting in, and furthering the activities referred to in paragraphs 1-58, and by adhering to an industry-wide practice of refusing to provide adequate warnings and refusing to adequately test.

60. Each defendant gave substantial assistance to some or all of the other defendants and each defendant's own conduct, separately considered, subjected plaintiffs to an unreasonable risk of harm, constituting numerous breaches of legal duties.

61. Plaintiffs have suffered harm as a direct and proximate result of defendants' tortious, unlawful concert of action.

COUNT V: CIVIL CONSPIRACY

62. Plaintiffs hereby incorporate by reference paragraphs 1-61, inclusive, as if fully set forth herein.

63. Defendants reached an agreement or tacit understanding to do the aforesaid acts with the unlawful intent of marketing asbestos and asbestos-containing products in an unlawful manner, *inter alia*, by suppressing knowledge about the dangers of asbestos, and by marketing without adequate testing and without adequate warnings.

64. The aforesaid acts, and similar acts, were committed in furtherance of this conspiracy to market

asbestos and asbestos-containing products in an unlawful manner.

65. Defendants' combination provided defendants with additional power to inflict injury, harm, physical harm and damages upon plaintiffs; such power would not have otherwise existed absent such combination.

66. Plaintiffs were directly and proximately harmed by defendants' tortious combination and conspiracy as alleged herein.

COUNT VI: INTENTIONAL TORT

67. Plaintiffs hereby incorporate by reference paragraphs 1-66, inclusive, as if fully set forth herein.

68. The aforesaid intentional and wrongful acts were committed by defendants for the purpose and with the specific intent of marketing friable asbestos-containing products and without privilege or justification, thereby proximately causing the harm, damages, and injury suffered by plaintiffs.

EQUITABLE RELIEF
COUNT VII: RESTITUTION

69. Plaintiffs hereby incorporate by reference paragraphs 1-68, inclusive, as if fully set forth herein.

70. Plaintiffs and members of the class, as a result of the defendants' failure to act and perform their legal duty to test, remove and/or contain friable asbestos-containing materials in plaintiffs' school buildings, have had to and will have to undertake the responsibility and duty of the defendants and to expend monies for the analysis,

removal and/or containment of friable asbestos-containing materials in school buildings and facilities in their possession, custody or control.

71. As a result of defendants' conduct, plaintiffs have been directly and materially harmed and injured.

COUNT VIII: MANDATORY INJUNCTIVE RELIEF

72. Plaintiffs hereby incorporate by reference paragraphs 1-71, inclusive, as if fully set forth herein.

73. Upon information and belief, a substantial amount of asbestos abatement remedial action has not as yet been undertaken by the plaintiff class. The continued presence of defendants' friable asbestos products poses a substantial health hazard to employees and school children, causes or threatens physical injury, renders plaintiffs' schools unreasonably dangerous and unsafe and damages plaintiffs' school buildings. These conditions create, impose and/or threaten plaintiffs with irreparable harm to persons and property.

74. Numerous class members lack the financial resources to perform all necessary asbestos abatement remedial action.

75. Under these circumstances, damages in the form of reimbursement for the costs of asbestos abatement remedial action incurred by plaintiffs and members of the class is an inadequate remedy at law and does not afford complete relief to the plaintiff class.

76. Under these circumstances, plaintiffs and members of the class seek equitable relief in the form of

mandatory injunctive relief requiring defendants to perform all such acts for the benefit of plaintiffs and members of the class as required by equity, including, but not limited to, inspection for, analysis, containment, removal and/or replacement of friable asbestos, all to be performed in a timely manner and at the expense of defendants.

77. Plaintiffs and members of the class also seek, in the form of equitable relief, to have defendants or others perform asbestos abatement remedial action to monitor the asbestos materials which have been contained and/or encapsulated within plaintiffs' property ("containment monitoring"). The need for this type of equitable relief is predicated upon the expectation that it will not be practical and/or feasible to remove all of the asbestos products in plaintiffs' property; and, therefore, certain such asbestos products will be retained on plaintiffs' property in an encapsulated or contained form, requiring ongoing "operations and maintenance" work, including monitoring, to assure that the asbestos remains in a contained form. In the absence of the direct performance of containment monitoring services by defendants or others, the Court should compel defendants to create a monetary fund designed to pay for the provision of such containment monitoring remedial action.

78. Plaintiffs and members of the class also seek, in the form of equitable relief, to have defendants or others provide asbestos abatement remedial action in the form of medical detection/surveillance and monitoring services to groups of individuals ("medical monitoring services"), including, in particular, high risk individuals, such as employees of plaintiffs, school children and other

individuals who have been or will be exposed to the friable asbestos-containing products which are or have been present in plaintiffs' property. The need for this type of equitable relief is predicated upon medical evidence that asbestos-related diseases may not become manifest until after the passage of a long period of time from the date of exposure and inhalation. By the provision of a medical monitoring service, individuals exposed to defendants' asbestos products in plaintiffs' property will be able to detect the presence of any asbestos-related disease at the earliest possible moment, and hopefully, well before manifestation in the form of severe physical impairment, disability or death. In the absence of direct performance of medical monitoring services by defendants or others, the Court should compel defendants to create a monetary fund to pay for the provision of such medical monitoring remedial action.

COUNT IX: MALICIOUS, RECKLESS MISCONDUCT – PUNITIVE DAMAGES

79. Plaintiffs hereby incorporate by reference paragraphs 1-78, inclusive, as if fully set forth herein.

80. The defendants engaged in malicious conduct, by either intentionally or with a reckless indifference to the interests of others failing to provide warnings to the foreseeable users of their products of the risks associated with breathing asbestos fibers; failing to test or adequately test asbestos and friable asbestos-containing products; failing to manufacture, produce or market a product which would be safe for its intended and foreseeable uses; failing to manufacture, produce or market a

substitute product which would be effective yet safe for its intended uses.

JURY TRIAL DEMANDED

81. Plaintiffs demand a trial by jury of all issues so triable in this case.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that:

A. Plaintiffs and other members of the class recover the general and special compensatory damages determined to have been sustained by each of them respectively, including, but not limited to, reimbursement of the costs of inspection, analysis, containment, removal and replacement of friable asbestos-containing products incurred by the plaintiff class, and that judgment therefore be entered herein against the defendants in an amount to be determined;

B. Plaintiffs and other members of the class recover punitive damages from defendants in an amount to be determined;

C. The Court issue an order requiring defendants to perform all necessary asbestos abatement remedial actions, including, *inter alia*, inspection, analysis, containment, removal, or replacement activities and containment monitoring and medical monitoring services for the benefit of plaintiffs, at defendants' own expense;

D. In the alternative, the Court order the creation of monetary funds to be funded entirely by defendants, the

purpose of which will be to enable plaintiffs to provide asbestos abatement action, including, *inter alia*, inspection, analysis, containment, removal or replacement activities, containment monitoring and medical monitoring services;

E. Plaintiffs and other members of the class recover the costs of this suit, including any expert witness fees, together with reasonable attorneys' fees; and

F. The Court grant such other, further or different relief as may be deemed just and proper.

/s/ Daniel Berger
David Berger
Harold Berger
Stanley R. Wolfe
Daniel Berger
Ruthanne Gordon
David Berger
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Arnold Levin
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Howard J. Sedran
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Philadelphia, PA 19106
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55 South Queen Street
York, PA 17403
(717) 848-1234

Attorneys for Plaintiffs

DATED: January 31, 1984

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MOTION TO AMEND PRETRIAL ORDER NO. 88 OF THE HONORABLE JAMES M. KELLY DATED JULY 21, 1987 TO SET FORTH THE LIST OF SCHOOLS EXCLUDED FROM THE SETTLEMENT CLASS

Proko Industries, Inc. by its counsel, Burrell, Waxman, Donaghy & Lee and Owens Illinois, Inc., by its counsel McCarter and English, move this Honorable Court to consider their Motion to Amend Pretrial Order No. 88 of the Honorable James M. Kelly dated July 21, 1987 and aver in support the following:

1. On July 21, 1987, a Hearing was held before the Honorable James M. Kelly to determine whether the proposed partial settlement between Owens-Illinois, Inc. ("O-I") and Proko Industries, Inc. ("Proko") should be approved as fair, adequate and reasonable and hear any objections thereto. Prior to this Hearing, the Court was provided with a list of 36,245 schools and school districts to which notice of the settlement and hearing was mailed.

2. Subsequent to the Hearing, Judge Kelly entered Pretrial Order No. 88 which approved the partial settlement and provided in part:

> The members of the Settlement Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 64, excluding all schools which filed a request to be excluded as of July 21, 1987, from the

Settlement Class pursuant to Federal Rule of Civil Procedure 23(c)(2). (See Pretrial Order No. 88 attached hereto as Exhibit "A".)

3. On or about August 19, 1987, Herbert B. Newberg, co-lead counsel for class plaintiffs, checked the post office box, P.O. Box 2179, to which all requests for exclusion from the settlement class were to be directed. As of that date, 353 schools submitted requests for exclusion from the settlement class that were post-marked on or before July 21, 1987. The affidavit of Herbert B. Newberg to that effect is attached hereto as Exhibit "B".

4. A list of all schools whose request for exclusion from the settlement class was postmarked on or before July 21, 1987 is attached hereto as Exhibit "C".

WHEREFORE, Proko Industries, Inc. and Owens-Illinois, Inc. request that their Motion be granted and that paragraph 1 of Pretrial Order No. 88 of the Honorable James M. Kelly be modified as follows:

> The members of the Settlement Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 64, excluding all schools which filed a request to be excluded as of July 21, 1987 from the Settlement Class pursuant to Federal Rule of Civil Procedure 23(c)(2). A list of all schools and school districts whose request for exclusion from the Settlement Class was postmarked on or before July 21, 1987 is attached hereto as Attachment "1".

Respectfully Submitted,

BURRELL, WAXMAN, DONAGHY & LEE

By: /s/ Luann M. Petrellis
Steven R. Waxman, Esquire
Luann M. Petrellis, Esquire

Attorneys for Proko Industries, Inc.

McCarter and English

Dated: Nov. 13, 1987 By: Gita Rothschild
Gita Rothschild, Esquire
Attorney for Owens-Illinois, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF PROKO INDUSTRIES, INC. AND OWENS-ILLINOIS, INC. FOR AMENDMENT OF PRETRIAL ORDER NO. 88 OF THE HONORABLE JAMES M. KELLY DATED JULY 21, 1987, TO SET FORTH THE LIST OF SCHOOLS EXCLUDED FROM THE SETTLEMENT CLASS

On July 21, 1987, a hearing was held before The Honorable James M. Kelly, to determine whether the proposed partial settlement between class plaintiffs and defendants, Owens-Illinois, Inc. and Proko Industries, Inc., should be approved as fair, adequate and reasonable and to hear any objections thereto. On or about July 17, 1987, the Court was provided with proof of notice to 36,245 schools and school districts of the proposed partial settlement and the hearing.

Thereafter, The Honorable James M. Kelly entered Pretrial Order No. 88 which approved the partial settlement and provided that all schools which desired to be excluded from the settlement class must submit the designated exclusion form as of July 21, 1987. (See Pretrial Order No. 88, dated July 21, 1987, attached hereto as Exhibit "A".)

On August 19, 1987, Herbert B. Newberg, co-lead counsel for class plaintiffs, checked the post office box to which all such requests for exclusion were to be directed. As of that date, 353 schools and/or school districts submitted requests for exclusion from the settlement class that were post-marked on or before July 21, 1987. (See Affidavit of Herbert B. Newberg, Esquire, attached hereto as Exhibit "B".)

Attached as Exhibit "C" is a list of all schools and/or school districts whose request for exclusion from the settlement class was post-marked on or before July 21, 1987.

WHEREFORE, Proko Industries, Inc. and Owens-Illinois, Inc. request that their Motion be Granted and that paragraph 1 of Pretrial Order No. 88 of the Honorable James M. Kelly dated July 21, 1987 be modified as follows:

> The members of the Settlement Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 64, excluding all schools which filed a request to be excluded as of July 21, 1987 from the Settlement Class pursuant to Federal Rule of Civil Procedure 23(c)(2). A list of all schools and school districts whose request for exclusion from the Settlement Class was postmarked on or before July 21, 1987 is attached hereto as Attachment "1".

Respectfully Submitted,

Burrell, Waxman, Donaghy & Lee

By: /s/ Luann M. Petrellis
Steven R. Waxman, Esquire
Luann M. Petrellis, Esquire
Attorneys for Proko Industries, Inc.

McCarter and English

Dated: Nov. 13, 1987 By: /s/ Gita Rothschild
Gita Rothschild, Esquire
Attorney for Owens-Illinois, Inc.

CERTIFICATE OF SERVICE

I, Luann M. Petrellis, Esquire, hereby certify that a copy of the within Motion to Amend Pretrial Order No. 88 of the Honorable James M. Kelly dated July 21, 1987 was hand-delivered to David Berger, Esquire, Lawrence T. Hoyle, Jr., Esquire, Ralph W. Brenner, Esquire and Herbert B. Newberg, Esquire and served by United States mail, first-class, postage prepaid, to the following:

Heritage Christian Schools,
P.O. Box 555
Saddle, Brook, New Jersey 07662

Bible Methodist Connection of Churches School Ministry
Rt 6, Box 1730
Pill City, Alabama 35125-9556

Weymouth Public Schools
111 Middle Street
Weymouth, Massachusetts 02189

Attorney General of the State of Hawaii
State of Hawaii
Department of the Attorney General

State Capitol
Honolulu, Hawaii 96813

All Counsel of Record

Dated: Nov. 13, 1987 /s/ Luann M. Petrellis
Luann M. Petrellis, Esquire

Exhibit "A"

[Exhibit "A" consisted of the court's order entered July 22, 1987, which is reprinted in this appendix as Appendix B.]

Exhibit "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

AFFIDAVIT OF HERBERT B. NEWBERG, ESQUIRE

COMMONWEALTH OF PENNSYLVANIA:

COUNTY OF PHILADELPHIA : SS

Herbert B. Newberg, Esquire, being duly sworn according to law, deposes and says that:

1. I am co-lead counsel, for the plaintiff class in the above-captioned matter.

2. Pursuant to Pretrial Order No. 84, I caused to be established and maintained a post office box, P.O. Box 2179, to which all requests for exclusion from the settlement class were to be returned. I last checked the post office box on August 19th, 1987.

3. As of August 19, 1987, 353 schools and school districts had filed exclusion request forms postmarked on or before July 21, 1987.

4. A list of those schools and school districts which have opted out of the settlement class by filing exclusion request forms postmarked on or before July 21, 1987, is attached to this Affidavit as Exhibit "A" and is true and correct to the best of my knowledge and belief.

/s/ Herbert B. Newberg
Herbert B. Newberg, Esquire

Sworn to and subscribed
before me this 2nd day
of November, 1987.

/s/ Lynn T. Meyer
Notary Public

[Exhibit "C" consisted of the same list of schools appended as Attachment "1" to Order No. 109, reprinted in this appendix as Appendix C.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER

AND NOW, this ___ day, of ___, 1987, it is hereby ORDERED that Paragraph one of Pretrial order No. 88 be modified as follows:

> The members of the Settlement Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 64, excluding all schools which filed a request to be excluded as of July 21, 1987 from the Settlement Class pursuant to Federal Rule of Civil Procedure 23 (c)(2). A list of all schools and school districts whose request for exclusion from the Settlement Class was postmarked on or before July 21, 1987 is attached hereto as Attachment "1".

The list of schools and school districts attached hereto and identified as attachment "1" is the complete and final list of all schools and school districts that have opted out of the Settlement Class as of July 21, 1987.

/s/ _____
James McGirr Kelly, U.S.D.J.

TO ALL COUNSEL: Attachment "1" has not been reduplicated as it appears as Exhibit "C" attached to this motion.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

RESPONSE OF DEFENDANTS, OWENS-ILLINOIS, INC. AND PROKO INDUSTRIES, INC., TO THE MEMORANDUM OF THE STATE OF HAWAII TO THE MOTION TO AMEND PRETRIAL ORDER NO. 88

I. BACKGROUND

Defendants, Owens-Illinois, Inc. ("O-I"), and Proko Industries, Inc. ("Proko"), have followed a tortuous path which began in 1984 towards settlement of this class action. Their initial effort came to naught when this Court denied preliminary approval of a proposed settlement which contemplated a mandatory Settlement Class. Class plaintiffs, O-I and Proko renegotiated the terms and conditions of their original agreement in light of the voluntary litigation class certified by the Court. This settlement agreement was reached in March, 1986 and was preliminarily approved by the Court in June, 1986.

The Court's preliminary approval of the O-I/Proko settlement necessarily contemplated the giving of notice to and an opportunity to opt out by members of the Settlement Class as well as the scheduling of a hearing for the Court to determine whether to approve the settlement. The steps were protracted due to lengthy debate concerning whether a combined notice should be given to

the Settlement Class and the Litigation Class or whether separate notices should be used. *See generally* Pretrial Order No. 88 ("Order") attached as Exhibit "A" to the Motion to Amend Pretrial Order No. 88.

In March, 1987, the Court ordered that separate notices be sent to the two classes and approved the two forms of notice. Inadvertantly, the approved Notice to the Settlement Class was internally inconsistent in that it contained two different deadlines for requesting exclusion from the Settlement Class and two different dates for the date of the approval hearing. *See* Pretrial Order No. 84 attached to the Memorandum of the State of Hawaii as Exhibit "A" to the Declaration of David Waters.

Prior to mailing the Notice, the inconsistency was brought to the attention of the Court by the parties and the necessary corrections were made by the Court. *See* Notice of Proposed Partial Settlement attached to the Memorandum of the State of Hawaii as Exhibit "A". The corrected Notice was mailed to 36,245 members of the class, including at least six public school districts in Hawaii,[1] between April 16 and 24, 1987. *See* Affidavit of David Berger filed on July 17, 1987; the relevant pages

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[1] Council for Proko has identified those six school districts based upon a general knowledge of the islands which comprise Hawaii and its principal city, rather than upon an exhaustive examination of the four-volume list of the 36,245 class members to whom notice was sent. It is possible – indeed, probable – that notice also was sent to the other school district which is referred to but not identified by the State of Hawaii. This can be readily ascertained once the name of that school district is supplied.

from the four-volume list submitted to the Court bearing the names of six Hawaiian school districts are attached hereto as Exhibit "A".

The Notice mailed to the Settlement Class provided that requests for exclusion had to be postmarked not later than June 22, 1987 and that the approval hearing would be held on July 21, 1987. As of July 17, 1987, 357 requests for exclusion postmarked on or before June 22, 1987 had been received; 8 requests postmarked after that date also had been received. *See* Affidavit of David Berger filed July 17, 1987. At the approval hearing, counsel for Proko advised the Court that there would be no objection if the Court were to exclude from the Settlement Class those 8 schools and school districts which submitted untimely requests. Hearing of July 21, 1987, N.T. 30-32.

Pretrial Order No. 88 entered following that hearing provided:

> "1. The members of the Settlement Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 64, excluding all schools which filed a request to be excluded as of July 21, 1987 from the Settlement Class pursuant to Fed.R.Civ.P.23(c)(2)." (Emphasis added.)

Thus, the Court extended the deadline for submitting requests for exclusion from the Settlement Class by approximately one month.

Relying upon the Order, the Settlement Class as defined therein, and the requests for exclusion which had been received, O-I and Proko did not exercise their right as set for in paragraph 16 of the Settlement Agreement to abrogate the settlement. The settlement became final and

binding upon O-I and Proko as well as upon the Settlement Class (subject, of course, to the filing of an appeal of the Order within thirty days – which did not occur).

By request dated July 31, 1987, the State of Hawaii requested exclusion from the Settlement Class. Recognizing that the time for requesting exclusion had expired, the request stated that "[s]hould it be necessary to do so, the Department of the Attorney General will seek an order from the above-captioned court permitting the public schools of Hawaii to opt out of the Settlement Class." *See* Memorandum of the State of Hawaii, Exhibit "B" to the Declaration of David Waters. By letter dated August 13, 1987 (and received August 17, 1987), counsel for O-I provided the State of Hawaii with a copy of the Order and further indicated that O-I would oppose any attempt on behalf of Hawaiian schools to opt out on the basis of an untimely filed request for exclusion. *See* Memorandum of the State of Hawaii, Exhibit "C" to the Declaration of David Waters.

The State of Hawaii did not request relief by this Court from the express provisions of the Order; the State of Hawaii did not appeal from the Order despite the provision that the Order constitutes a final judgment under Fed.R.Civ.P. 54(b). The appeal period expired on August 21, 1987.

On November 13, 1987, O-I and Proko filed this pending Motion to Amend the Order. The sole purpose of the amendment is to attach to the Order a list which co-lead counsel for plaintiffs, counsel for O-I and counsel for Proko agree contains the names and addresses of all

schools and school districts whose requests for exclusion were postmarked on or before July 21, 1987.

The State of Hawaii now purports to challenge this Motion. But, it does not and cannot contend that the Settlement Class defined in Paragraph 1 of the Order is being misconstrued or that it submitted a request for exclusion by July 21, 1987. Instead, the State of Hawaii seeks new and special relief from the clear and unambiguous terms of the Order.

For the reasons set forth below, neither the "facts" nor the law upon which the State of Hawaii relies justifies the relief sought.

II. ARGUMENT

A. THE FACTS UPON WHICH THE STATE OF HAWAII RELIES DO NOT JUSTIFY THE RELIEF SOUGHT.

The State of Hawaii makes certain assertions upon which it relies to support the proposition that neither its Department of the Attorney General nor school district employees should be held responsible for the failure to submit a timely request for exclusion for the Settlement Class. It is clear, however, that these assertions do not stand up under scrutiny and do not justify the relief sought.

It is important to note that the State of Hawaii does not and cannot assert that none of its school districts received the formal Notice of the Proposed Partial Settlement mailed at the direction of the class plaintiffs. The State of Hawaii necessarily concedes that at least one such Notice postmarked April 16, 1987 was received. *See*

Memorandum of the State of Hawaii, Declaration of Herbert Watanabe and Exhibit "A" thereto.[2]

This Notice stated:

"PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS MAY BE AFFECTED BY LEGAL PROCEEDINGS IN THIS LITIGATION."

In view of this language, there was simply no basis for the recipient of this Notice to assume that it did not or might not concern the State of Hawaii. There was no basis for the recipient to believe that this Court did not have some purpose in causing this Notice to be sent to the Hawaii School District. Nonetheless, the recipient did not refer the Notice to someone in authority at the school district; the recipient did not refer the Notice to counsel, i.e., the Department of the Attorney General, for advice and guidance. Instead, the recipient simply ignored the Notice and "did not speak with anyone about the document or transmit it to anyone until approximately July 30, 1987" – even though the very first line of the Notice refers to a hearing scheduled for July 21, 1987.

The very purpose of this Notice would be frustrated if its recipient can simply ignore it and thereafter seek to avoid being bound by its terms.

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[2] As noted above, the Notice was mailed to at least six school districts in Hawaii – Central Oahu, Windward Oahu, Hawaii, Honolulu, Kauai and Maui. O-I and Proko do not know the extent of the investigation to determine whether the others were received, but note that the Notice sent to the "Superintendent" of the Hawaii School District was actually received by its "district business specialist". One can only speculate concerning the internal distribution of the school districts' mail.

The conduct of an employee of the Hawaii School District, however, may be immaterial to the matter because the Department of the Attorney General of the State of Hawaii had actual knowledge of the pendency of this litigation and of the fact that notice of a proposed partial settlement had been or was being distributed.

The State of Hawaii acknowledges that one of its Deputy Attorneys General reviewed an issue of the *Asbestos Litigation Reporter* on or about May 18, 1987 but asserts that the Deputy Attorney General relied upon that publication for the proposition that prospective members of the Settlement Class would have until August 1, 1987 to request exclusion. The publication clearly alerted the Deputy Attorney General to the fact that the Court would be considering a proposed settlement and that class members would have an opportunity to exclude themselves, but it appears that the Deputy Attorney General did not – and still has not – read the Notice to the Settlement Class which was published.

Paragraph 15 of the Notice published in the *Asbestos Litigation Reporter* specifically stated:

> "Each school or school district from which a completed request for exclusion postmarked by June 8, 1987, has been received, will be excluded." (Emphasis added.)

Conversely, the exclusion request form attached to the Notice stated that "[t]he deadline for mailing this completed form is August 1, 1987." Similarly, introductory paragraph of the Notice stated that the approval hearing would be held on June 18, 1987 while Paragraph 5 indicated that the hearing was scheduled for August 14, 1987.

Given the obvious inconsistencies of the Notice, the Deputy Attorney General could not reasonably rely on this Notice to establish either the date for requesting exclusion from the Settlement Class or the date of the approval hearing. The Deputy Attorney General should have realized, however, that the last date for mailing a request for exclusion could have been as early as June 8, 1987.

During the three weeks between his review of the Notice published in the *Asbestos Litigation Reporter* and June 8, 1987, the Deputy Attorney General did nothing – he did not contact this Court; he did not contact any counsel identified in the Notice; and he did not contact the *Asbestos Litigation Reporter* to determine whether there had been an error in the publication.

On July 24, 1987, the Deputy Attorney General learned that the deadline for opting out had passed. *See* Memorandum of the State of Hawaii, Declaration of David Waters, para. 8. Nonetheless, the only action taken by the State of Hawaii was to submit a request for exclusion notwithstanding the knowledge that such request was untimely.

More important, the Deputy Attorney General was sent a copy of the Order on August 13, 1987, which was received on August 17, 1987. *See* Memorandum of the State of Hawaii, Declaration of David Waters, para. 12 and Exhibit "C" thereto. It was clear that the Court had approved the settlement and defined the Settlement Class in such a way that the Hawaiian school districts were included in the Settlement Class because their requests for exclusion had not even been prepared until July 31,

1987. Although no confusion could have existed and the time for taking an appeal from the Order had not expired, no action was taken on behalf of the State of Hawaii.

The State of Hawaii has never taken any action to seek relief from the Order. Instead, it is attempting to convert a request that the Court perform a ministerial act by attaching a list of excluded schools and school districts to the Order into a substantive modification of the terms of the Order.

This should not be permitted.

B. The Legal Arguments Upon Which the State of Hawaii Relies Do Not Justify Granting the Relief Sought.

The State of Hawaii raises several legal arguments in support of its position that it should not be bound by the O-I/Proko settlement. These arguments, however, are without merit.

First, the State of Hawaii argues that it is immune from suit pursuant to the eleventh Amendment to the United States Constitution. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1983). This argument ignores the fact that the State of Hawaii has not been sued – it is a member of the plaintiff-class – and States are not prohibited from utilizing the federal courts on their own behalf.

Indeed, this argument has already been raised in this litigation and expressly rejected by both this Court and the Court of Appeals for the Third Circuit, particularly in the context of the distinction between a mandatory class certified pursuant to Fed.R.Civ.P. 23(b)(1) or (2) and a

voluntary class certified pursuant to Rule 23(b)(3). Under the law of the case doctrine, the State of Hawaii cannot now attempt to relitigate this issue.

Second, the State of Hawaii argues that it has never been properly served pursuant to Fed.R.Civ.P. 4(d)(6). This argument, however, misconceives the very nature of these proceedings. Neither O-I nor Proko is suing the State of Hawaii. To the contrary, the State of Hawaii is suing O-I and Proko as a member of the class which plaintiffs have been certified to represent. Notification to members of the class is governed by Fed.R.Civ.P. 23, not by Rule 4.

Third, the State of Hawaii argues that notice to the members of the class was inadequate because class plaintiffs failed to meet their burden of adequately identifying the members of the class, i.e., all of the school districts in Hawaii. This argument must fail because it is based on an inaccurate factual premise, i.e., the class plaintiffs did not identify the school districts in Hawaii. As noted above, a cursory review of the mailing list utilized by the class plaintiffs establishes that notice was mailed to at least six school districts in Hawaii and, most likely, the other school district which the State of Hawaii has not yet identified by name.

More important, the State of Hawaii simply cannot maintain that it did not have notice. The Hawaii School District in Hilo, Hawaii undisputedly received notice but failed to submit that notice to the Department of the Attorney General or any other legal agency responsible for the legal affairs of the school district. The Department of the Attorney General undisputedly knew in May, 1987

that a proposed settlement was before the Court and should have known that the deadline for requesting exsclusion could have been as early as June 8, 1987. Given the actual knowledge of both the Hawaii School District and the Department of the Attorney General, it cannot reasonably be argued that notice to the Settlement Class was inadequate.

Fourth and finally, the State of Hawaii argues that State law bars this Court from binding the State of Hawaii to the terms and conditions of the settlement. In support of this argument, the State of Hawaii asserts that "the Department of the Attorney General has the exclusive power to settle legal disputes." Neither O-I nor Proko disputes this statement of State law.[3] But, the issue before the Court is not whether the Department of the Attorney General *has* the requisite authority; the issue is whether the Department of the Attorney General *exercised* that authority.

For the reasons set forth above, O-I and Proko submit that the Attorney General apparently failed to take the steps necessary to effectuate the result which it now seeks. The Attorney General, however, has not and can not cite any statute, procedural rule or case law for the proposition that a State or its agency vested with the requisite authority can simply fail to comply with Court

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[3] This case clearly differs from *In Re Armored Car Antitrust Litigation*, 645 F.2d 488 (5 Cir. 1981), relied upon by the State of Hawaii. In that case, the issue was whether the Attorney General or the political subdivisions had authority to determine whether to participate in a class settlement. No such conflict exists in this case.

ordered procedures and thereby circumvent their force and effect.

III. CONCLUSION

O-I and Proko negotiated a settlement agreement with the class palintiffs. A primary purpose for negotiating a settlement was that it would enable these defendants to achieve certainty concerning the nature and extent of both the settled claims and the claims of those schools and school districts which excluded themselves from the Settlement Class. Prior to achieving that certainty, O-I and Proko reserved the right to abrogate the settlement if, in their good faith judgment, an inordinately high number of class members excluded themselves from the Settlement Class. This did not occur and both O-I and Proko have now bound themselves to the settlement. The attempt of the State of Hawaii to exclude itself at this late date is, to say the least, problematic. First, fundamental fairness requires that O-I and Proko be given the opportunity to reconsider their decision to proceed in light of changed circumstances if Hawaii now is excluded. Equally if not more important, the exclusion of the State of Hawaii *nunc pro tunc* would suggest the possibility that other schools or school districts could reconsider their decision to remain in the Settlement Class and destroy whatever certainty presently exists.

Schools and school districts were given until June 22, 1987 to exclude themselves from the Settlement Class. A substantial number availed themselves of that opportunity. In the interest of fairness and to avoid unnecessary additional proceedings, counsel for the parties indicated to the Court that they would have no objection to excluding those schools and school districts which requested

exclusion on or before the date of the approval hearing held on July 21, 1987.

But a time must come when the Settlement Class becomes fixed. O-I and Proko submit that the final deadline for requesting exclusion was and should remain July 21, 1987 and that the State of Hawaii, having failed to request exclusion by that date, must remain in the Settlement Class and be bound by the terms of Pretrial Order No. 88.

Having failed to comply with its obligations under the Notice and having failed to seek relief from pretrial Order No. 88 in an appropriate fashion, the State of Hawaii should not now be permitted to convert the pending Motion of O-I and Proko to serve its own purposes.

WHEREFORE, Owens-Illinois, Inc. and Proko Industries, Inc. request this Court to grant their Motion to Amend Pretrial Order No. 88 or, in the alternative, deny the Motion without further alteration of the Order notwithstanding the efforts of the State of Hawaii to cause a substantive modification of that Order.

RESPECTFULLY SUBMITTED,

BURRELL, WAXMAN, DONAGHY & LEE

By: /s/ Steven R. Waxman
Steven R. Waxman
Attorneys for Settling Defendant,
Proko Industries, Inc.

McCARTER & ENGLISH

By: /s/ Gita Rothschild
Gita Rothschild
Attorneys for Settling Defendant,
Owens-Illinois, Inc.

DATE 04/13/87

MARKET DATA RETRIEVAL, INC.
EDUCATIONAL DATA BASE LISTING

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
CENTRAL LEE CNTY SCHOOL DIST RURAL ROUTE DONNELLSON IA 52625	(319) 838-2211 PID 00242727 MDR 16056002000	1,172	K-12	75.00 PLUS SUPERINTENDENT
CENTRAL LINN SCH DISTRICT 552C 32433 HIGHWAY 228 HALSEY OR 97348	(503) 369-2811 PID 00875087 MDR 38022004000	821	1-12	60.00-74.99 SUPERINTENDENT
CENTRAL LOCAL SCHOOL DISTRICT RURAL ROUTE 1 SHERWOOD OH 43556	(419) 658-2186 PID 00797851 MDR 36020011000	1,348	K-12	25.00-29.99 SUPERINTENDENT
CENTRAL LYON CNTY SCHOOL DIST 1105 SOUTH STORY STREET ROCK RAPIDS IA 51246	(712) 472-4041 PID 00244141 MDR 16060007000	791	K-12	75.00 PLUS SUPERINTENDENT

"EXHIBIT A"

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
CENTRAL MONTCALM SCHOOL DIST 1480 SHERIDAN ROAD SW STANTON MI 48888	(517) 831-5243 PID 00502278 MDR 23059055000	2,093	K-12	75.00 PLUS SUPERINTENDENT
CENTRAL NINE VOC-TECH SCH DIST PO BOX 426 GREENWOOD IN 46142	(317) 888-4401 PID 00339746 MDR 15041013000	831	11-12	 SUPERINTENDENT
CENTRAL NOBLE CNTY SCHOOL DIST 200 EAST MAIN STREET ALBION IN 46701	(219) 636-2175 PID 00349399 MDR 15057003000	1,258	K-12	50.00-54.99 SUPERINTENDENT
CENTRAL OAHU SCHOOL DISTRICT 1136 CALIFORNIA AVENUE WAHIAWA HI 96786	(808) 621-9094 PID 00228238 MDR 12002001000	34,567	K-12	75.00 PLUS SUPERINTENDENT
CENTRAL OHIO JT VOC SCH DIST 7877 ROUTE 42 NE PLAIN CITY OH 43064	(614) 873-4666 PID 01417468 MDR 36049201000	500	11-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
CENTRAL REG SCHOOL DISTRICT P O BOX C BAYVILLE NJ 08721	(201) 269-1100 PID 00695461 MDR 31015005000	1,734	7-12	75.00 PLUS SUPERINTENDENT
CENTRAL SCHOOL DIST 34 ROUTE 3-BOX 249 HARLOW OK 73055	(405) 658-2929 PID 00862559 MDR 37069003000	348	K-12	55.00-59.99 SUPERINTENDENT
CENTRAL SCHOOL DISTRICT RURAL ROUTE 1 SWITZ CITY IN 47465	(812) 659-2274 PID 00336512 MDR 15028012000	322	K-12	75.00 PLUS SUPERINTENDENT
CENTRAL SCHOOL DISTRICT 13J 1610 MONMOUTH STREET INDEPENDENCE OR 97351	(503) 838-0030 PID 00880484 MDR 38027014000	2,232	K-12	60.00-74.99 SUPERINTENDENT
CENTRAL SCHOOL DISTRICT 48 ROUTE 1 BOX 383 JUDSONIA AR 72081	(501) 729-3947 PID 00035835 MDR 04073004000	498	K-12	45.00-49.99 SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
CENTRAL SQUARE SCHOOL DISTRICT SOUTH MAIN STREET CNTRL SQUARE NY 13036	(315) 668-2611 PID 00765406 MDR 33038018000	4,411	K-12	50.00-54.99 SUPERINTENDENT
CENTRAL STICKNEY CNTY SD 110 50TH ST & SOUTH LONG AVE CHICAGO IL 60638	(312) 458-1152 PID 00268387 MDR 14016026000	270	PK-8	75.00 PLUS SUPERINTENDENT
HAVERHILL CITY SCHOOL DISTRICT 4 SUMMER STREET HAVERHILL MA 01830	(617) 374-3400 PID 00421777 MDR 22005030000	6,634	K-12	40.00-44.99 SUPERINTENDENT
HAVERHILL CO-OP SCHOOL DIST 23 MUNICIPAL BLDG-COURT ST WOODSVILLE NH 03785	(603) 747-2701 PID 01816383 MDR 30005018000	857	K-12	75.00 PLUS SUPERINTENDENT
HAVERSTRAW-STONY PT CTL SD 117 MAIN STREET STONY POINT NY 10980	(914) 942-2700 PID 00767569 MDR 33044004000	6,689	K-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
HAVILAND UNIFIED SCH DIST 474 PO BOX 243 HAVILAND KS 67059	(316) 862-5256 PID 00365721 MDR 17049006000	161	K-12	55.00-59.99 SUPERINTENDENT
HAVRE SCHOOL DISTRICT 16 A PO BOX 7791 HAVRE MT 59501	(406) 265-4356 PID 00603365 MDR 27021013000	2,469	K-12	75.00 PLUS SUPERINTENDENT
HAWAII SCHOOL DISTRICT P O BOX 4160 HILO HI 96720	(808) 961-7237 PID 00226979 MDR 12005001000	20,541	K-12	75.00 PLUS SUPERINTENDENT
HAWKINS CO SCHOOL DISTRICT 200 DEPOT STREET NORTH ROGERSVILLE TN 37857	(615) 272-7629 PID 00982616 MDR 43037037000	7,811	K-12	25.00-29.99 SUPERINTENDENT
HAWKINS IND SCHOOL DISTRICT PO DRAWER L HAWKINS TX 75765	(214) 769-2181 PID 01061813 MDR 44250005000	767	K-12	60.00-74.99 SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
HAWLEMONT REG SCHOOL DISTRICT ASHFIELD STAR RTE-SU 65 SHELBURNE FLS MA 01370	(413) 625-9811 PID 00424638 MDR 22006027000	137	K-6	75.00 PLUS SUPERINTENDENT
HAWLEY IND SCHOOL DISTRICT 150 PO BOX 608 HAWLEY MN 56549	(218) 483-3555 PID 00530706 MDR 24014009000	786	K-12	75.00 PLUS SUPERINTENDENT
HAWLEY INDEP SCHOOL DISTRICT PO BOX D HAWLEY TX 79525	(915) 537-2214 PID 01035266 MDR 44127004000	606	K-12	35.99-39.99 SUPERINTENDENT
HAWORTH SCHOOL DISTRICT 205 VALLEY ROAD HAWORTH NJ 07641	(201) 384-5526 PID 00668614 MDR 31002023000	336	K-8	75.00 PLUS SUPERINTENDENT
HAWORTH SCHOOL DISTRICT 6 PO BOX 99 HAWORTH OK 74740	(405) 245-1441 PID 00853211 MDR 37045018000	648	K-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
HAWTHORN CNTY CONS SCH DIST 73 201 HAWTHORN PARKWAY VERNON HILLS IL 60061	(312) 367-3226 PID 00300939 MDR 14049026000	2,984	K-8	60.00-74.99 SUPERINTENDENT
HAWTHORN SCHOOL DISTRICT 17 1913 HAWTHORN ROAD MARENGO IL 60152	(815) 568-5171 PID 00305599 MDR 14056012000	95	K-8	75.00 PLUS SUPERINTENDENT
HAWTHORNE CEDAR KNOLLS UFSD 226 LINDA AVENUE HAWTHORNE NY 10532	(914) 769-2790 PID 00780406 MDR 33060025000	322	3-12	55.00-59.99 SUPERINTENDENT
HOMER CNTY SCHOOL DISTRICT 403 S HILLSDALE STREET HOMER MI 49245	(517) 568-4461 PID 00479463 MDR 23013040000	1,116	K-12	35.99-39.99 SUPERINTENDENT
HOMER CNTY SCHOOL DISTRICT 31R PO BOX 340 HOMER NE 68030	(402) 698-2377 PID 00613085 MDR 28022028000	383	K-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
HOMER ELEM SCHOOL DIST 33C ROUTE 1 BOX 367 ROMEOVILLE IL 60441	(815) 838-2875 PID 00324832 MDR 14099043000	2,020	K-8	55.00-59.99 SUPERINTENDENT
HOMEWOOD CITY SCHOOL DISTRICT PO BOX 59366 BIRMINGHAM AL 35259	(205) 870-4203 PID 00011059 MDR 01037009000	2,540	K-12	45.00-49.99 SUPERINTENDENT
HOMEWOOD SCHOOL DIST 153 18211 ABERDEEN AVENUE HOMEWOOD IL 60430	(312) 799-5661 PID00270334 MDR 14016064000	1,605	K-8	75.00 PLUS SUPERINTENDENT
HOMEWOOD-FLOSSMOOR CHSD 233 199 KEDZIE AVENUE FLOSSMOOR IL 60422	(312) 799-3000 PID 00270396 MDR 14016162000	2,311	11-12	75.00 PLUS SUPERINTENDENT
HOMINY SCHOOL DISTRICT 38 PO BOX 400 HOMINY OK 74035	(918) 885-2037 PID 00858443 MDR 37057018000	823	K-12	60.00-74.99 SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
HONDO IND SCHOOL DISTRICT 2608 AVENUE H HONDO TX 78861	(512) 426-3027 PID 01041239 MDR 44163004000	1,671	PK-12	60.00-74.99 SUPERINTENDENT
HONDO VALLEY SCHOOL DISTRICT PO BOX 55 HONDO NM 88336	(505) 653-4411 PID 00707131 MDR 32014004000	153	K-12	75.00 PLUS SUPERINTENDENT
HONEOYE CENTRAL SCH DISTRICT PO BOX 170 HONEOYE NY 14471	(716) 229-5171 PID 00763783 MDR 33035015000	1,009	K-12	75.00 PLUS SUPERINTENDENT
HONEOYE FALLS LIMA SCH DIST 20 CHURCH ST-BOX 601 HONEOYE FALLS NY 14472	(716) 624-3300 PID 00732136 MDR 33028020000	1,859	K-12	75.00 PLUS SUPERINTENDENT
HONEY GROVE IND SCH DISTRICT 400 SOUTH 6TH ST HONEY GROVE TX 75446	(214) 378-2264 PID 01017472 MDR 44074009000	486	K-12	45.00-49.99 SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
HONOLULU SCHOOL DISTRICT 4967 KILAUEA AVENUE HONOLULU HI 96816	(808) 735-2438 PID 00227612 MDR 12001001000	37,999	K-12	75.00 PLUS SUPERINTENDENT
HONONEGAH CNTY HSD 207 307 SALEM STREET ROCKTON IL 61072	(815) 624-8951 PID 00327274 MDR 14101016000	1,153	9-12	75.00 PLUS SUPERINTENDENT
HOOD CANAL SCHOOL DISTRICT 404 NORTH 111 HIGHWAY 106 SHELTON WA 98584	(206) 877-9700 PID 01106475 MDR 48023005000	301	K-8	60.00-74.99 SUPERINTENDENT
HOOD RIVER CO SCHOOL DISTRICT PO BOX 920 HOOD RIVER OR 97031	(503) 386-2511 PID 00871668 MDR 38014002000	2,790	K-12	75.00 PLUS SUPERINTENDENT
KARLSRUME SCHOOL DISTRICT 54 PO BOX 365 KARLSRUME ND 58744	(701) 525-6371 PID 00655239 MDR 35025020000	97	K-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
KARLSTAD IND SCHOOL DIST 353 PO BOX 178 KARLSTAD MN 56732	(218) 436-2261 PID 00538332 MDR 24035004000	426	K-12	75.00 PLUS SUPERINTENDENT
KARNACK IND SCHOOL DISTRICT PO BOX 259 KARNACK TX 75661	(214) 679-3117 PID 01028574 MDR 44102007000	510	PK-12	40.00-44.99 SUPERINTENDENT
KARNES CITY IND SCH DISTRICT PO BOX 38 KARNES CY TX 78118	(512) 780-2321 PID 01035395 MDR 44128002000	974	K-12	60.00-74.99 SUPERINTENDENT
KARNS CITY AREA SCH DISTRICT RD 2 BOX 12 KARNS CITY PA 16041	(412) 756-2030 PID 00898821 MDR 39010046000	1,493	K-12	55.00-59.99 SUPERINTENDENT
KARVAL SCHOOL DIST RE 23 PO BOX 272 KARVAL CO 80823	(303) 446-5311 PID 00153906 MDR 06037015000	69	K-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
KASBEER CONSOLIDATED SD 23 PO BOX 1 KASBEER IL 61328	(815) 879-7161 PID 00263733 MDR 14006021000	37	K-8	55.00-59.99 SUPERINTENDENT
KASHUNAMIUT SCHOOL DISTRICT 985 KSD WAY CHEVAK AK 99563	(907) 858-7713 PID 02892043 MDR 02037159000	180	K-12	 SUPERINTENDENT
KASKASKIA ISLAND CONS SD 124 RURAL ROUTE 1 SAINT MARYS MO 63673	(618) 366-2675 PID 01871864 MDR 14079007000	22	K-8	75.00 PLUS SUPERINTENDENT
KASSON-MANTORVILLE IND SD 204 PO BOX 158 KASSON MN 55944	(507) 634-2961 PID 00532297 MDR 24020006000	1,195	K-12	75.00 PLUS SUPERINTENDENT
KATHRYN SCHOOL DISTRICT 93 PO BOX 197 KATHRYN ND 58049	(701) 796-7671 PID 00650813 MDR 35002032000	48	K-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
KATONAH LEWISBORO UF SCH DIST KATONAH NY 10536	(914) 763-5000 PID 00780535 MDR 33060002000	2,602	K-12	75.00 PLUS SUPERINTENDENT
KATY IND SCHOOL DISTRICT PO BOX 159 KATY TX 77492	(713) 391-2184 PID 01026227 MDR 44101015000	16,001	K-12	45.00-49.99 SUPERINTENDENT
KAUAI SCHOOL DISTRICT 3060 ELWA STREET LIMUE HI 96766	(808) 245-4493 PID 00229414 MDR 12007001000	8,348	K-12	75.00 PLUS SUPERINTENDENT
KAUFMAN IND SCHOOL DISTRICT 1000 SOUTH HOUSTON ST KAUFMAN TX 75142	(214) 932-3045 PID 01035606 MDR 44129005000	2,142	PK-12	30.99-34.99 SUPERINTENDENT
KAUKAUNA AREA SCHOOL DISTRICT 101 OAK STREET KAUKAUNA WI 54130	(414) 766-5711 PID 01138492 MDR 60045006000	2,910	PK-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
MATHEWS CO SCHOOL DISTRICT PO BOX 369 MATHEWS VA 23109	(801) 725-3909 PID 01078268 MDR 47058058000	1,275	K-12	45.00-49.99 SUPERINTENDENT
MATHEWS LOCAL SCHOOL DISTRICT 4429 WARREN SHARON RD VIENNA OH 44473	(216) 394-1800 PID 00836029 MDR 36078008000	1,291	K-12	75.00 PLUS SUPERINTENDENT
MATHIAS TAP SCHOOL DISTRICT PO BOX 210 TRENARY MI 49891	(906) 446-3360 PID 00475223 MDR 23002006000	145	K-12	75.00 PLUS SUPERINTENDENT
MATHIS IND SCHOOL DISTRICT PO BOX 1177 MATHIS TX 78368	(512) 547-3378 PID 01049645 MDR 44205004000	2,255	PK-12	60.00-74.99 SUPERINTENDENT
MATTAPOISETT SCHOOL DISTRICT 135 MARION ROAD - SU 55 MATTAPOISETT MA 02739	(617) 758-2772 PID 01839701 MDR 22012015000	480	K-6	50.00-54.99 SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
MATTAWAN CONS SCHOOL DISTRICT 56720 MURRAY STREET MATTAWAN MI 49071	(616) 668-3361 PID 00515328 MDR 23080064000	2,194	K-12	60.00-74.99 SUPERINTENDENT
MATTESON ELEM SCHOOL DIST 162 210 ILLINOIS STREET PK FOREST IL 60466	(312) 748-0100 PID 00271247 MDR 14016089000	2,224	K-8	55.00-59.99 SUPERINTENDENT
MATTITUCK-CUTCHOGUE-UFSD PO BOX 1438 MATTITUCK NY 11952	(516) 298-8460 PID 00774160 MDR 33052091000	1,246	K-12	75.00 PLUS SUPERINTENDENT
MATTOLE UNION ELEM SCH DIST PO BOX 32 PETROLIA CA 95558	(707) 629-3311 PID 00060593 MDR 05012040000	90	K-8	75.00 PLUS SUPERINTENDENT
MATTOON CU SCH DISTRICT 2 100 NORTH 22ND STREET MATTOON IL 61938	(217) 235-5446 PID 00260682 MDR 14015002000	4,217	K-12	60.00-74.99 SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
MAUD IND SCHOOL DISTRICT PO BOX 308 MAUD TX 75567	(214) 585-2219 PID 01001033 MDR 44019010000	461	K-12	25.00-29.99 SUPERINTENDENT
MAUD SCHOOL DISTRICT I-117 PO BOX 130 MAUD OK 74854	(405) 374-2417 PID 00860616 MDR 37063025000	532	K-12	75.00 PLUS SUPERINTENDENT
MAUI SCHOOL DISTRICT P O BOX 1070 WAILUKU HI 96793	(808) 244-4221 PID 00229567 MDR 12006001000	15,142	K-12	75.00 PLUS SUPERINTENDENT
MAUMEE CITY SCHOOL DISTRICT 2345 DETROIT AVENUE MAUMEE OH 43537	(419) 893-3200 PID 00816940 MDR 36048005000	3,031	K-12	60.00-74.99 SUPERINTENDENT
MAUPIN SCHOOL DISTRICT 84 PO BOX 346 MAUPIN OR 97037	(503) 395-2665 PID 00882171 MDR 38033014000	131	K-8	60.00-74.99 SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
MAURICE RIVER TWP SCHOOL DIST PO DRAWER D PRT ELIZABETH NJ 08348	(609) 825-7411 PID 00676609 MDR 31006008000	462	K-8	75.00 PLUS SUPERINTENDENT
WINDSOR CENTRAL SCHOOL DIST MAIN STREET WINDSOR NY 13865	(607) 655-1501 PID 00717253 MDR 33004028000	1,961	K-12	75.00 PLUS SUPERINTENDENT
WINDSOR CENTRAL SU 51 MOUNT TOM WOODSTOCK VT 05091	(802) 457-1213 PID 01094339 MDR 46014037000	1,214	PK-12	SUPERINTENDENT
WINDSOR CNTY UNIT SCH DIST 1 PO BOX 160 WINDSOR IL 61957	(217) 459-2408 PID 00320501 MDR 14087011000	458	K-12	60.00-74.99 SUPERINTENDENT
WINDSOR LOCKS TOWN SCHOOLS 50 CHURCH STREET WINDSOR LOCKS CT 06096	(203) 627-1483 PID 00165545 MDR 07002026000	1,620	K-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
WINDSOR NORTHWEST SU 50 PLEASANT STREET BETHEL VT 05032	(802) 234-5364 PID 01094250 MDR 46014035000	721	K-12	SUPERINTENDENT
WINDSOR SCHOOL DIST RE-4 PO BOX 609 WINDSOR CO 80550	(303) 686-7411 PID 00158451 MDR 06062032000	1,469	K-12	75.00 PLUS SUPERINTENDENT
WINDSOR SCHOOL DISTRICT WINDSOR SOUTHEAST SU WINDSOR VT 05089	(802) 674-6344 PID 01820798 MDR 46014025000	760	K-12	75.00 PLUS SUPERINTENDENT
WINDSOR SCHOOL DISTRICT C 1 6208 HIGHWAY 61-67 IMPERIAL MO 63052	(314) 467-6007 PID 00569355 MDR 26050014000	2,002	K-12	75.00 PLUS SUPERINTENDENT
WINDSOR SCHOOL DISTRICT R 1 P O BOX 7 WINDSOR MO 65360	(816) 647-3533 PID 00564537 MDR 26042037000	725	K-12	75.00 PLUS SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
WINDSOR SOUTHEAST SU 52 147 MAIN STREET WINDSOR VT 05089	(802) 674-2144 PID 01094444 MDR 46014038000	1,545	K-12	SUPERINTENDENT
WINDSOR SOUTHWEST SU 53 MAIN STREET-VAIL BLDG CHESTER VT 05143	(802) 875-3365 PID 01094511 MDR 46014039000	1,268	K-12	SUPERINTENDENT
WINDSOR TOWN SCHOOL DISTRICT PO BOX 10 WINDSOR CT 06095	(203) 688-3631 PID 00165430 MDR 07002025000	4,026	K-12	75.00 PLUS SUPERINTENDENT
WINDSOR UNION SCHOOL DISTRICT 7650 BELL ROAD WINDSOR CA 95492	(707) 838-9444 PID 00134675 MDR 05049071000	1,012	K-8	75.00 PLUS SUPERINTENDENT
WINDTHORST IND SCHOOL DISTRICT PO BOX 190 WINDTHORST TX 76389	(817) 423-6688 PID 00995273 MDR 44005005000	300	K-12	35.99-39.99 SUPERINTENDENT

NAME AND ADDRESS		TOTAL ENROLL	GRADE SPAN	TOTAL INST. MATERIAL
WINDWARD OAHU SCHOOL DISTRICT 45-955 KAMEHAMEHA HWY KANEOHE HI 96744	(808) 247-6051 PID 00228630 MDR 12004001000	19,530	K-12	75.00 PLUS SUPERINTENDENT
WINFIELD CITY SCHOOL DISTRICT PO BOX 70 WINFIELD AL 35594	(205) 487-4255 PID 00014518 MDR 01047002000	1,530	K-12	50.00-54.99 SUPERINTENDENT

CERTIFICATE OF SERVICE

I, Steven R. Waxman, Esquire, hereby certify that a copy of the within Response of Defendents, Owen-Illinois, Inc. and Proko Industries, Inc. to the Memorandum of the State of Hawaii was hand-delivered to David Berger, Esquire, Lawrence T. Hoyle, Jr., Esquire, Ralph W. Brenner, Esquire and Herbert B. Newberg, Esquire and served by United States mail, first-class, postage prepaid, to the following:

Heritage Christian Schools,
P.O. Box 555
Saddle Brook, New Jersey 07662

Bible Methodist Connection of Churches School Ministry
Rt 6, Box 1730
Pill City, Alabama 35125-9556

Weymouth Public Schools
111 Middle Street
Weymouth, Massachusetts 02189

Attorney General of the State of Hawaii
State of Hawaii
Department of the Attorney General
State Capitol
Honolulu, Hawaii 96813

All Counsel of Record

Dated: 12-28-87 /s/ Steven R. Waxman
Steven R. Waxman, Esquire

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM IN OPPOSITION TO MOTION TO AMEND PRETRIAL ORDER NO. 88 OF THE HONORABLE JAMES M. KELLY DATED JULY 21, 1987 TO SET FORTH THE LIST OF SCHOOLS EXCLUDED FROM THE SETTLEMENT CLASS

(Filed December 30, 1987)

I. INTRODUCTION

The State of Hawaii contends that this court lacks both subject matter and personal jurisdiction over the State of Hawaii. The instant motion has, however, been served upon the Attorney General of the State of Hawaii, and movants apparently seek to bind the State to the terms of whatever order may be entered in response to said motion. The State of Hawaii consequently requests that this court permit it to make a special appearance solely to challenge this court's jurisdiction and to secure an order protecting the State from the terms of a settlement which the State considers to be adverse to its interests.

II. STATEMENT OF FACTS

Defendants Proko Industries, Inc., and Owens-Illinois, Inc., have filed a motion seeking to specify those parties bound by a settlement agreement. The State of Hawaii is one of the parties targeted by the motion. Although movants do not set forth in their motion or supporting papers the facts or law pertinent to the State of Hawaii, apparently movants contend that Hawaii was late in its attempt to opt out of the settlement, and therefore the State must now be bound by the terms of this agreement.

The facts pertinent to the instant motion are documented in the declarations of Herbert Watanabe and David Waters submitted herewith. The Department of the Attorney General of the State of Hawaii has attempted to keep abreast of litigation concerning asbestos, pending in Pennsylvania and other states, by corresponding with the attorneys general of other states and with the National Association of Attorneys General. On or about May 18, 1987, the Hawaii Department of the Attorney General received from the National Association of Attorneys General a copy of a notice printed in the *Asbestos Litigation Reporter,* dated April 3, 1987, which stated that prospective members of a settlement class and a litigation class would have until August 1, 1987, to mail in notice to opt out of either class. The Department of the Attorney General relied upon this notice. In mid-July of 1987, the Attorney General's office began contacting Department of Education employees to attempt to track down the actual form sent out by the class representatives. Having been unsuccessful in locating this document, the undersigned counsel telephoned one of the plaintiffs' attorneys, Mr.

Sheldon Toubman, on July 24, 1987. Mr. Toubman informed the undersigned counsel that the deadline for opting out had already passed.

On July 30, 1987 the "Notice of Proposed Partial Settlement of Class Action, etc." was located. It had been sent to the following address:

Superintendent
Hawaii School District
P.O. Box 4160
Hilo, HI 96720

Contrary to the practice in most – if not all – other states, the entire public school system in Hawaii is under the jurisdiction of the State. Hawaii Rev. Stat. § 27-1 provides in pertinent part:

> The purpose of the chapter is to fix responsibility for certain functions, which are of statewide concern, in the state government. These functions which are declared to be state functions are as follows:
>
> (1) Planning, construction, improvement and maintenance of public school facilities and grounds and the transportation of school children; provided that nothing in this paragraph shall preclude the several counties from expending their own funds to supplement state funds.

The addressee for the opt out notice, the Hawaii School District, based in Hilo, is only one of seven school districts in the state system. Hilo is located on the Island of Hawaii, and is a small town in comparison to the state capital, Honolulu. If the opt out notice was intended to include all public school districts in the State of Hawaii, it was not properly addressed. The notice was sent to neither all seven school districts in the State nor to the

central administration for all these districts, which is located in Honolulu. Under the circumstances, it was not surprising that the person who received the opt out notice, Mr. Herbert Watanabe, did not realize that the document was intended to be a legal notice to the entire state school system.

On July 31, 1987, the Department of the Attorney General mailed to the clerk of court and to counsel its notice opting out of the settlement class. Such notice was timely under the original deadline provided to the Office of the Attorney General through the publication in the *Asbestos Litigation Reporter,* which had been received by the Attorney General's Office on May 18, 1987.

III. ARGUMENT

A. THE ELEVENTH AMENDMENT PROHIBITS THIS COURT FROM ASSUMING JURISDICTION OVER, AND ENTERING AN ORDER AGAINST, THE STATE OF HAWAII

The Eleventh amendment of the United States Constitution provides that states are immune from suit in federal court. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1983). If the instant motion is granted, the State of Hawaii will be affected adversely. Counsel for one of the movants, Ms. Gita F. Rothschild, has informed the Attorney General's office that her client will use the settlement in this action as a basis for foreclosing the State of Hawaii from recovering any damages from Owens-Illinois in a separate suit.

If movants secure the order they now seek, such a result will clearly breach the protection afforded to all states by the Eleventh Amendment. The relief sought by

movants is essentially a declaratory judgment against the State of Hawaii – declaring that the State is bound by the terms of the settlement agreement and may not commence litigation against movants. The Eleventh Amendment prohibits suing the State for such relief in federal court. Although movants may argue that they are not suing Hawaii in federal court, in all practical senses they are. Movants should not be permitted to accomplish indirectly that which they may not accomplish directly.

B. HAWAII STATE LAW BARS GIVING EFFECT TO THE SETTLEMENT

Hawaii Rev. Stat. §26-7 provides in pertinent part:

> The department of the attorney general shall be headed by a single executive to be known as the attorney general.
>
> The department shall administer and render state legal services, including furnishing of written legal opinions to the governor, legislature, and such state departments and officers as the governor may direct; represent the State in all civil actions in which the State is a party; approve as to legality and form all documents relating to the acquisition of any land or interest in lands by the State; and, unless otherwise provided by law, prosecute cases involving violations of state laws and cases involving agreements, uniform laws, or other matters which are enforceable in the courts of the State. The attorney general shall be charged with such other duties and have such authority as heretofore provided by common law or statute.

The statutory provision cited above has been interpreted to give the Department of the Attorney General the *exclusive* power to settle legal disputes. *Island-Gentry Joint Venture v. State*, 57 Haw. 259, 554 P.2d 761 (1976).

In *Island-Gentry*, a state agency entered into a written settlement agreement with a private company, but the settlement was not approved by the Attorney General. The Hawaii Supreme Court held that the settlement agreement was invalid because the Attorney General "has exclusive authority to control and manage for the State all phases of civil litigation in which the State has an interest, unless authority to do so in specific matters has been expressly or impliedly granted to another department or agency." 57 Haw. at 264-265, 554 P.2d at 765-766.

In the instant case, the movants apparently contend that because notice of settlement was sent to one of the seven school districts in Hawaii, and because the state employee who received the notice failed to appreciate its significance and opt out of the settlement, the entire State is bound by the settlement. If the *Island-Gentry* settlement agreement was not effective against the State unless and until endorsed by the Attorney General, then *a fortiori* the mere mailing of a settlement document to a single employee of the State is not effective absent the express approval of the Attorney General.

This court must apply Hawaii law to determine whether Hawaii has, or has not, opted out of the settlement class. The Fifth Circuit addressed this issue in *In Re Armored Car Antitrust Litigation*, 645 F.2d 488 (1981). In *Armored Car*, the Attorney General of Maryland filed a

notice to opt *out* of a settlement class, but three Maryland political subdivisions had previously filed notice of opting *into* the settlement class. The lower court held that the three political subdivisions had, indeed, opted into the settlement, despite the later action taken by the Attorney General. The Fifth Circuit reversed, relying upon the authority given to the Attorney General by the Maryland Constitution. 645 F.2d at 491-492. The Fifth Circuit held:

> The Attorney General, however, has a representational status independent of that provided for, and contemplated in, Rule 23. Hence, because the Attorney General's authority and responsibility as representative of the state's political subdivisions does not derive from Rule 23, the notice and opt-out provision of that rule are not binding upon him or her.

645 F.2d at 493.

In the instant case, the Attorney General of the State of Hawaii at no time approved of, or consented to, the settlement with Proko Industries, Inc., and Owens-Illinois, Inc.

C. GOOD CAUSE EXISTS TO HONOR THE STATE'S NOTICE TO OPT OUT

The State of Hawaii did submit notice of opting out, and good cause exists to consider said notice to be timely. On May 18, 1987, the Department of the Attorney General was provided with notice that the deadline for opting out was August 1, 1987 (Exhibit "A," Declaration of David Waters). It sent such notice on July 31, 1987 (Exhibit "B," Declaration of David Waters). There was no "sleeping on one's rights" in this case. The notice published in the *Asbestos Litigation Reporter* may have been incorrect or

premature, but certainly such notice could be relied upon in the absence of a corrective notice. No such corrective notice was sent to the Department of the Attorney General. Good cause therefore exists to consider the Attorney General's opt out notice timely.

D. REPRESENTATIVES OF THE PLAINTIFFS' CLASS FAILED TO MEET THEIR BURDENS OF IDENTIFYING MEMBERS OF CLASS AND PROVIDING ADEQUATE NOTICE

Representatives of any plaintiffs' class do not meet their notice burden by merely sending notices out to a list of names and addresses. These representatives have the initial burden of properly *identifying* the members of the class. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

The inadequate notice provided to the State of Hawaii resulted from the class plaintiffs' failure to identify all the school districts present in the State of Hawaii. With very little effort, class plaintiffs could have ascertained that there are seven rather than one school district in the State. Indeed, anyone with even a slight acquaintance with the geography of Hawaii should have realized that a single notice sent to Hilo, Hawaii, would probably not result in notification to all of Hawaii's public school districts. If the instant class action had been filed in Hawaii – not Pennsylvania – would notice sent from Hawaii to a single school district located in a rural town like Chadd's Ford, Pennsylvania, be considered sufficient to bind every single public school district in Pennsylvania? Surely, in such a hypothetical case, the Hawaii class representatives and other affected parties would have

had the good grace to admit their mistake and permit Pennsylvania school districts to opt out of the settlement.

In some cases, class representatives who have sent out notices to large organizations have been ordered to provide an instruction in the notice informing the recipient that he should bring the notice to the attention of other members of the organization. *Alliance to End Repression v. City of Chicago,* 91 F.R.D. 182, 192 (N.D. Ill., 1981). In the instant case, the notice sent to the Hilo school district did *not* inform the Hilo district that it should notify the other districts in Hawaii's public school system. Plaintffs' notice to Hawaii was clearly not the best notice practicable under the circumstances. Hawaii should not be forced to remain involuntarily in a class on account of the class representatives' failure to identify the seven school districts in Hawaii and their failure to provide adequate notice to each district or to the central administration.

E. THIS COURT LACKS PERSONAL JURISDICTION OVER THE STATE OF HAWAII

Rule 4(d)(6) of the Federal Rules of Civil Procedure provides that service of process on states requires service on the chief executive officer or on another person designated by state law as a recipient of service. Rule 4(d)(4) of the Hawaii Rules of Civil Procedure provides that service of process on the State requires service on the Attorney General or a Deputy Attorney General.

No process in this case has been served on the Governor of Hawaii or the Department of the Attorney General. While the instant motion was served by mail on the

Department of the Attorney General, the State of Hawaii contends that this court lacks the personal jurisdiction over the State required to enter the order requested by movants.

IV. CONCLUSION

For the foregoing reasons, the State of Hawaii requests that any order entered in response to the instant motion provide that no public school and no public school district in Hawaii is bound by the settlement with Proko Industries, Inc., and Owen-Illinois, Inc.

DATED: Honolulu, Hawaii, December 11, 1987.

Respectfully submitted,

/s/ David Waters
DAVID WATERS
Deputy Attorney General
Attorney for State of Hawaii

State of Hawaii
Department of the Attorney General
State Capitol, Room 405
415 South Beretania Street
Honolulu, Hawaii 96813

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNYSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

DECLARATION OF HERBERT WATANABE

I, Herbert Watanabe, declare that:

1. I am a district business specialist for the Hawaii District of the State of Hawaii, Department of Education.

2. The State of Hawaii, not the county government, has jurisdiction over the public schools in the State.

3. Hawaii has seven school districts – four on the Island of Oahu (the island with the highest population), and one each on the Islands of Maui, Kauai, and Hawaii.

4. My business address is Box 4160, Hilo, Hawaii.

5. Hilo is located on the Island of Hawaii, not the Island of Oahu.

6. Hilo is a small town in comparison to Honolulu, the capital of the State. Honolulu is located on the Island of Oahu.

7. The central administration for all seven of Hawaii's school districts is located in Honolulu.

8. The Department of the Attorney General of the State of Hawaii represents Hawaii's school districts and the Department of Education.

9. Sometime during the summer of 1987, my office received a document, a true copy of which is attached to this declaration as Exhibit "A". I am not sure of the exact date that this document was received by my office.

10. After I received the aforementioned document, I did not speak with anyone about the document or transmit it to anyone until approximately July 30, 1987.

11. On or about July 30, 1987, I was alerted by another Department of Education employee, Mr. Thomas Nakai, whose office is in Honolulu, that the Attorney General's office was searching for the aforementioned document.

12. Prior to July 30, 1987, I did not discuss the aforementioned document with any person or transmit it to any person because previous correspondence and communications I had received on asbestos matters had come through EPA headquarters in California. I assumed that since the aforementioned document made reference to legal matters pending in Pennsylvania, it did not concern the State of Hawaii. I further assumed that any legal notice regarding the entire public school system of the State of Hawaii would be sent to either all school districts in the State or to the central administration in Honolulu.

13. As far as our office has been able to determine, in investigating the matter subsequent to July 30, 1987, no other office in the State received a copy of the document, a true copy of which is attached hereto as Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on DEC 4 1987.

/s/ Herbert Watanabe
HERBERT WATANABE

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

NOTICE OF PROPOSED PARTIAL SETTLEMENT OF CLASS ACTION, CERTIFICATION OF TEMPORARY SETTLEMENT CLASS, AND SETTLEMENT HEARING RELATING TO SCHOOL ASBESTOS CLAIMS

This Notice is being issued to advise you that the Court has scheduled a hearing on July 21, 1987 at 10:00 a.m. in Courtroom 8A of the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106, to consider whether to approve a partial settlement with two of the defendants named in this litigation (the "Litigation"). The purpose of this Notice is to provide you with information so that, as a possible member of the class which may be affected by the partial settlement of this action, you may make an informed decision with respect to your participation in that partial settlement. These matters are described in more detail below.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS MAY BE AFFECTED BY LEGAL PROCEEDINGS IN THIS LITIGATION.

THIS NOTICE AND THE OPPORTUNITY TO OPT OUT INCLUDED HEREIN RELATES ONLY TO THE SETTLEMENT CLASS (THE "SETTLEMENT CLASS")

ESTABLISHED PURSUANT TO THE AGREEMENT OF SETTLEMENT WITH DEFENDANTS OWENS-ILLINOIS, INC. AND PROKO INDUSTRIES, INC. (THE "AGREEMENT"). IT IS NOT TO BE CONFUSED WITH THE CERTIFICATION OF THE LITIGATION CLASS AS AGAINST ALL DEFENDANTS BY THE DISTRICT COURT ON SEPTEMBER 28, 1984.

FURTHER, THIS NOTICE IS NOT TO BE CONFUSED WITH THE PROOF OF CLAIM FOR PROPERTY DAMAGE CLAIMANTS WHICH MAY HAVE BEEN SENT TO YOU BY ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN THE MANVILLE CORPORATION BANKRUPTCY PROCEEDING. THE MANVILLE CORPORATION IS NOT A DEFENDANT IN THIS CLASS ACTION. PRESENTLY, ALL PROCEEDINGS REGARDING MANVILLE ARE BEING HANDLED BY THE BANKRUPTCY COURT.

This Notice is given pursuant to Rule 23 of the Federal Rules of Civil Procedure. This Notice is not an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by any party in this litigation. The purpose of this Notice is to inform you of the pendency of a proposed partial settlement, and of the rights you have with respect to the proposed settlement.

BACKGROUND

1. There currently are 53 defendants involved in the Litigation. All of the defendants, including the two Settling Defendants, Owens-Illinois, Inc. ("O-I"), and Proko

Industries, Inc. ("Proko"), deny that they are liable for any claims asserted by plaintiffs.

NOTICE OF PROPOSED PARTIAL SETTLEMENT OF CLASS ACTION, OF CERTIFICATION OF SETTLEMENT CLASS, AND OF SETTLEMENT HEARING

2. NOTICE IS HEREBY GIVEN THAT THE SETTLING DEFENDANTS LISTED BELOW HAVE CREATED SETTLEMENT FUNDS AGGREGATING $4,500,000.00 ("FUND"), EXCLUSIVE OF INTEREST ON THE FUND, FOR SCHOOLS AND SCHOOL DISTRICTS WHICH MAY HAVE HAD INSTALLED ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS IN THEIR SCHOOL BUILDINGS:

DEFENDANT	SETTLEMENT FUND CONTRIBUTION
Owens-Illinois, Inc.	$3,450,538.00
Proko Industries, Inc.	$1,039,462.00

AS OF AUGUST 7, 1986, THE FUND AGGREGATED APPROXIMATELY $4,800,000.00 AND IT CONTINUES TO EARN INTEREST.

3. Class Plaintiffs' counsel recommend Court approval of the proposed partial settlement with these defendants (the "Proposed Partial Settlement") as fair and reasonable and in the best interests of the members of the Settlement Class, in view of (1) the risks and costs of continuing the Litigation as against O-I and Proko, (2) the substantial and valuable benefits which will accrue under the terms of the Proposed Partial Settlement to those members of the Settlement Class who do not opt-out, and (3) the favorable total sum of these settlements

compared to potential recoveries from the remaining non-settling defendants in the Litigation.

4. Notice also is hereby given that on June 16, 1986, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, a temporary settlement class was certified by the United States District Court for the Eastern District of Pennsylvania. This Settlement Class includes all public and non-profit private elementary and secondary schools in the United States and is defined as follows:

> All entities which own or operate in whole or in part any public educational facilities, as defined in Section 198(a)(1) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. Section 2854. Throughout the United States: and all entities which own or operate in whole or in part any non-public, non-profit elementary or secondary educational facilities, including entities with religious affiliations, in the United States to the extent that such non-profit entities are owned or operated by one or more non-profit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

The Settlement Class has been certified for the purpose of giving this Notice to each Settlement Class member school or school district of the Proposed Partial Settlement with defendants O-I and Proko, and allow it either to exclude itself from the Settlement Class or to voice any objection to or support for the Proposed Partial Settlement. Members of the Settlement Class not excluding themselves will participate in the benefits of the Agreement, including the Fund established by it, if it is finally approved by the Court.

5. Notice also is hereby given, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of an Order of the United States District Court for the Eastern District of Pennsylvania that a hearing will be held before the Honorable James McGirr Kelly, in Courtroom 8A of the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, 19106, at 10:00 a.m. on July 21, 1987 (the "Approval Hearing"), for the purpose of determining whether the Proposed Partial Settlement with O-I and Proko is fair and reasonable. At the Approval Hearing, the Court will consider whether it should approve the Agreement of Settlement dated March 26, 1986 that was entered into between plaintiffs and O-I and Proko, and partially dismiss the Litigation with respect to O-I and Proko. The Approval Hearing, once commenced, may be adjourned from time to time by the Court, without further notice.

6. At the Approval Hearing, any member of the Settlement Class who has not filed a request for exclusion from the Settlement Class, in the manner set forth below, may appear in person or by counsel and be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the Proposed Partial Settlement. However, no party will be heard in opposition to the Proposed Partial Settlement and no paper or brief submitted by any such party will be accepted or considered by the Court unless, on or before June 22, 1987, such person (a) files with the Clerk of the Court notice of its intention to appear, together with a statement that indicates the basis for such opposition, and (b) serves copies thereof, and copies of any other

papers or briefs it files with the Court, in person or by mail, upon each of the following attorneys:

1. David Berger, Esq.
DAVID BERGER
ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103

2. Herbert B. Newberg, Esq.
HERBERT B. NEWBERG, ESQ., PC
200 Lippincott Building
227 S. 6th Street
Philadelphia, PA 19106

Counsel for Class Plaintiffs

3. Gita F. Rothschild, Esq.
McCARTER & ENGLISH
550 Broad Street
Newark, NJ 07102-4578

Counsel for Defendant Owens-Illinois, Inc.

4. Steven R. Waxman, Esq.
BURRELL, WAXMAN, DONAGHY & LEE
230 S. Broad St.,
17th Floor
Philadelphia, PA 19102

Counsel for Defendant Proko Industries, Inc.

DESCRIPTION OF THE PARTIAL SETTLEMENT

I. Authorized Settlement Fund Expenditures

7. The Fund, established pursuant to the Proposed Partial Settlement, as embodied in the Agreement, is being maintained in full, subject only to such deductions or expenditures as are expressly provided in the Agreement and approved or otherwise ordered by the Court. The Fund is to be distributed to Settlement Class members or otherwise as the Court may direct upon final judicial approval of the Proposed Partial Settlement or at the conclusion of this Litigation, or is to be returned to Settling Defendants in the event that this Proposed Partial Settlement fails to obtain final judicial approval. Notice is expressly given that, subject to approval of the Court, the Fund may be dispersed in part to defray the

costs of the Litigation, including such reasonable attorneys' fees as may be awarded by the Court.

8. Subject to Court approval, the plaintiffs also will be reimbursed and indemnified out of the Fund for all expenses and costs related to this Notice and incurred in the administration of the Fund.

9. Except with respect to the expenses of Notice or as otherwise expressly permitted by provisions of the Agreement and by the Court, or otherwise ordered by the Court, no distribution of the Fund is to be made until there has been a final judicial approval of the Proposed Partial Settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and until a final judgment of dismissal has been entered with respect to Settling Defendants against all plaintiffs and all members of the Settlement Class (except Opt-outs and Excluded Districts, as defined below), and an Order of the Court allowing such distribution has been entered.

II. Dismissal of the Litigation Against Settling Defendants

10. In the event of final judicial approval of the Proposed Partial Settlement the plaintiffs, and any and all members of the Settlement Class who are not Opt-outs or Excluded Districts, will be deemed to have agreed that they will be forever barred from instituting, maintaining, or prosecuting only against O-I and Proko any of the Class Action Claims with respect to the installation, prior to September 28, 1984, of asbestos-containing material in any of the school buildings which are the subject of the Litigation, and that O-I and Proko are to be discharged

from any and all responsibility with respect to such claims.

III. Reserved Rights of Settling Defendants and the Class Members

11. CLASS PLAINTIFFS AND SETTLEMENT CLASS MEMBERS HAVE EXPRESSLY RESERVED ALL THEIR RIGHTS AND CLAIMS AGAINST ALL NON-SETTLING DEFENDANTS. THE AGREEMENT OF SETTLEMENT AND ANY COVENANT WHICH IS EXECUTED PURSUANT THERETO IS NOT INTENDED AND IS NOT TO BE CONSTRUED AS A RELEASE OR DISMISSAL BY CLASS PLAINTIFFS AND SETTLEMENT CLASS MEMBERS OF ANY CLAIMS OR RIGHTS AGAINST ANY NON-SETTLING DEFENDANT.

12. Under certain conditions, either O-I or Proko (or both) may, at their option exercised in good faith, elect to withdraw from the Agreement, whereupon the Agreement will be null and void as the defendant(s) so withdrawing (but will remain in full force and effect as to any defendant not so withdrawing).

13. The Proposed Partial Settlement of the Litigation does not include or affect claims by the School Districts of (i) Los Angeles, California, (ii) Philadelphia, Pennsylvania, (iii) Cinnaminson, New Jersey and (iv) any other such litigation brought or contemplated against O-I or Proko in which a binding separate settlement agreement has been reached as of March 26, 1986 (collectively, the "Excluded Districts"). Any payments made by O-I or Proko to the Opt-outs or to the Excluded Districts, or to

any of them, will be in addition to the settlement payments to the Settlement Class out of the Fund.

14. In the event of final judicial approval of the Proposed Partial Settlement and in the event that any Settlement Class member obtains a judgment against one or more non-settling defendants in a class action or otherwise, and those non-settling defendants obtain a judgment against one or more of the Settling Defendants for contribution or indemnity, then such Settlement Class member will be required to reduce any judgment or proportion thereof obtained from any such non-settling defendants by the proportionate amount of such judgment attributable to O-I's and Proko's sales of asbestos-containing materials and installations of such asbestos-containing materials in and to buildings owned or operated by such Settlement Class member. However, in such event, the reduction in judgment will not exceed the amount of the judgment by the non-settling defendants as against Settling Defendants, and no plaintiff or Settlement Class member will be required to pay any sums to O-I or Proko on account of any liability of O-I or Proko in any such action, nor to pay any costs or fees of O-I or Proko expended to appear in or defend any such action.

OPPORTUNITY TO OPT-OUT FROM SETTLEMENT CLASS

15. Any member of the Settlement Class who does not desire to remain a member of the Settlement Class may request exclusion therefrom by sending to Michael E. Kunz, Clerk of the Court, United States District Court for the Eastern District of Pennsylvania, c/o P.O. Box 2179, Philadelphia, Pennsylvania, 19103, a completed Exclusion Form, as attached to this Notice. Such requests

for exclusion must set forth all the information requested in the Exclusion Form. Each school or school district from which a completed request for exclusion postmarked by June 22, 1987 has been received, will be excluded.

16. *ANY PERSON EXCLUDED FROM THE SETTLEMENT CLASS WILL NOT BE ALLOWED TO OBJECT TO THE PROPOSED PARTIAL SETTLEMENT AND WILL NOT PARTICIPATE IN RECEIVING THE BENEFITS OF THE FUND OF $4,500,000.00.* If you are excluded from the Settlement Class you will not be bound by any judgment which may be entered in the Litigation as against the Settling Defendants and may pursue whatever legal remedies you may have against the Settling Defendants. If you do not request exclusion from the Settlement Class in the manner set forth above, you will be bound by whatever judgment is rendered, including any judgment entered approving the Settlement.

17. The Settlement Class and the procedure for, and consequences of, excluding yourself from the Settlement Class that is discussed above is not to be confused with the pending Litigation Class certified against all the defendants in these consolidated actions. FURTHER, A REQUEST FOR EXCLUSION FROM THE SETTLEMENT CLASS WILL NOT CONSTITUTE AN EXCLUSION FROM THE LITIGATION CLASS, NOR WILL PARTICIPATION IN THE SETTLEMENT CLASS PRECLUDE YOU FROM LATER EXCLUDING YOURSELF FROM THE LITIGATION CLASS.

EXAMINATION OF PAPERS

18. The summary of certain provisions of the Agreement, and of the Proposed Partial Settlement embodied therein, which is contained in this Notice, is not intended,

and should not be construed, as a complete statement of the Agreement or of the Litigation. For a more detailed statement of the matters involved in the Litigation, including the terms of the Agreement, you are referred to the papers on file under the caption, *In re Asbestos School Litigation*, Master File No. 83-0268, which may be inspected during regular business hours at the Office of the Clerk of the United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Philadelphia, Pennsylvania 19106. If you have any questions about this Notice, please write to one of the Class counsel. PLEASE DO NOT DIRECT QUESTIONS TO THE COURT OR THE CLERK'S OFFICE.

PROVISION FOR ATTORNEYS' FEES AND EXPENSES

19. Upon the Court's approval of the Proposed Partial Settlement, counsel for Class Plaintiffs may apply to the Court for an award of attorneys' fees and expenses incurred in the prosecution of the Litigation with respect to O-I and Proko, to be drawn from the Settlement Fund. Class Plaintiffs also may apply to the Court for use of some or all of such an award to cover the costs of Class Plaintiffs' proceeding with the Litigation as against all of the other defendants who have not settled. In any event, any awards, and the use to be made of such awards, will be determined by the Court upon application of Class Plaintiffs.

MICHAEL E. KUNZ
Clerk of Court
United States District Court of
the Eastern District of Pennsylvania

DATED: April 16, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

REQUEST FOR EXCLUSION FROM SETTLEMENT CLASS

TO: Michael E. Kunz
Clerk of Court
P.O. Box 2179
Philadelphia, PA 19103

DO NOT COMPLETE THIS FORM IF YOU WISH TO REMAIN A MEMBER OF THE SETTLEMENT CLASS

PLEASE TAKE NOTICE THAT _____

_____

(Print name of school, school district

_____

or other entity requesting exclusion)

_____

(Print address)

hereby requests to be excluded from the Settlement Class with respect to the Proposed Partial Settlement with defendants Owens-Illinois, Inc. and Proko Industries, Inc.

_____ _____

(Date) (Signature)

_____

(Print Name of Signator and relationship of Signator to party requesting Exclusion)

(THE DEADLINE FOR MAILING THIS COMPLETED FORM IS JUNE 22 1987).

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Michael E. Kunz
Clerk of the United States District Court for the
Eastern District of Pennsylvania
P.O. Box 2179
Philadelphia, PA 19103

DO NOT REMOVE MAILING LABEL

SUPERINTENDENT
HAWAII SCHOOL DISTRICT
P O BOX 4160
HILO HI 96720

FIRST CLASS MAIL

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

DECLARATION OF DAVID WATERS

I, DAVID WATERS, declare that:

1. I am a Deputy Attorney General of the State of Hawaii.

2. The Department of the Attorney General of the State represents Hawaii's school districts and the Department of Education.

3. The Department of the Attorney General has attempted to keep abreast of litigation concerning asbestos, pending in Pennsylvania and other states, by corresponding with the attorneys general of other states and with the National Association of Attorneys General.

4. On or about May 18, 1987, the Department of the Attorney General received from the National Association of Attorneys General a copy of a notice printed in the *Asbestos Litigation Reporter,* dated April 3, 1987, which stated that prospective members of a settlement class and a litigation class would have until August 1, 1987, to mail in notice of opting out of either of these classes. A true copy of the aforementioned notice is appended to this declaration as Exhibit "A."

5. The Department of the Attorney General relied upon this notice.

6. In mid-July of 1987, I began contacting Department of Education employees to attempt to track down the actual form which I assumed to have been sent to the Department of Education, notifying the Department of its right to opt out of the settlement and litigation classes.

7. I was unsuccessful in locating any document sent to any Department of Education employee, and on July 24, 1987, I telephoned one of the attorneys for the plaintiffs, Mr. Sheldon Toubman.

8. Mr. Toubman informed me on July 24, 1987, that the deadline for opting out had already passed.

9. On July 30, 1987, the Department of the Attorney General was able to track down the actual notice sent by the representatives of the plaintiffs' class, and said notice had been sent to the following address:

Superintendent
Hawaii School District
P.O. Box 4160
Hilo, HI 96720

10. The Hawaii School District is only one of seven school districts located in the State of Hawaii (see Declaration of Herbert Watanabe).

11. On July 31, 1987, I mailed to Michael E. Kunz, and to counsel listed in the certificate of service, a notice of opting out of the settlement involving Proko Industries, Inc., and Owen-Illinois, Inc. A true copy of the aforementioned notice is appended to this declaration as Exhibit "B."

13. On August 17, 1987, I received from Gita F. Rothschild, attorney for Owens-Illinois, Inc., a letter stating that Owens-Illinois would not honor the notice to opt

out and would "oppose any attempt by any Hawaii School to file an action for asbestos abatement cost against Owens-Illinois." A true copy of the aforementioned letter is appended to this declaration as Exhibit "C."

13. The Attorney General of the State of Hawaii has not approved of, and has not consented to, the settlement with Proko Industries, Inc., and Owens-Illinois, Inc.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 11, 1987.

/s/ David Waters
DAVID WATERS
Deputy Attorney General
State of Hawaii

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER NO. 84

Re: CLASS NOTICE AND NOTICE OF PROPOSED PARTIAL SETTLEMENT OF CLASS ACTION, CERTIFICATION OF TEMPORARY SETTLEMENT CLASS, AND SETTLEMENT HEARING RELATING TO SCHOOL ASBESTOS CLAIMS

AND NOW, this 27th day of March, 1987, upon consideration of the submissions of all the parties regarding notices to class members, it is ORDERED that:

1. Within sixty (60) days from the date of this order, plaintiffs, at their expense, shall mail a copy of the Notices attached as Exhibit "A" hereto by first class mail to each school district which is in this class as set out specifically in Order No. 20. Plaintiffs shall file with the Clerk, and serve on defendants, an alphabetical list of the names and addresses of all class members to whom notice was sent. This list shall be filed with the court and served on defendants by August 1, 1987.

2. The return address on the envelope used for mailing notices and the address to which exclusion requests must be directed shall be the Clerk of this Court, but at a post office box number arranged between plaintiffs' counsel and the Clerk of this Court so that plaintiffs' counsel, not the clerk, will perform the task of recording mail returned to the postal service and the costs associated with it. A claim form received at the P.O. Box Number stated as the clerk's return address shall be considered as if received by the clerk. Plaintiffs' counsel shall forward to the Clerk of this Court a certified alphabetical list of all plaintiffs who chose to opt out. This list shall be forwarded to the Clerk of the Court by November 1, 1987. Plaintiffs' counsel shall keep in their possession the individual returned opt out notices throughout the duration of this litigation.

BY THE COURT:

/s/ James McGirr Kelly
JAMES McGIRR KELLY, J.

ATTACHED HERETO ARE *TWO* NOTICES.

PART (A) is Notice to Class Action Litigation Relating to School Asbestos Claims.

Part (B) is Notice of Proposed Partial Settlement of Class Action, Certification of Temporary Settlement Class, and Settlement Hearing Relating to School Asbestos Claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

(A) NOTICE TO CLASS ACTION LITIGATION RELATINGTO SCHOOL ASBESTOS CLAIMS

This Notice is being sent to you pursuant to an Order of the United States District Court for the Eastern District of Pennsylvania and Rule 23(c)(2) of the Federal Rules of Civil Procedure. The purpose of this Notice is to inform you of the pendency of a class action in which you are a member of a class. You are being informed of these matters so that you may make appropriate decisions as to what steps you may wish to take in relation to this litigation.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. THIS IS THE FIRST COURT NOTICE

YOU HAVE RECEIVED OF THIS ACTION, REGARDLESS OF WHAT OTHER NOTICES YOU MAY HAVE RECEIVED IN THE PAST CONCERNING THE PRESENCE OF ASBESTOS IN SCHOOL BUILDINGS OR ANY OTHER LEGAL PROCEEDING. FURTHER, THIS NOTICE IS NOT TO BE CONFUSED WITH THE FORM OF PROOF OF CLAIM FOR PROPERTY DAMAGE CLAIMANTS WHICH MAY HAVE BEEN SENT TO YOU BY ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN THE MANVILLE CORPORATION BANKRUPTCY PROCEEDING. THE MANVILLE CORPORATION IS NOT A DEFENDANT IN THIS CLASS ACTION. PRESENTLY, ALL PROCEEDINGS REGARDING MANVILLE ARE BEING HANDLED BY THE BANKRUPTCY COURT.

1. There are now pending in the United States District Court for the Eastern District of Pennsylvania claims brought by the following school districts: The School District of Lancaster (Pennsylvania), the Manheim Township School District (Pennsylvania), the Lampeter-Strasburg School District (Pennsylvania), the Barnwell School District No. 45 (South Carolina), the Board of Education of the Memphis City Schools (Tennessee), and the Napa Valley Unified School District (California). These plaintiffs have brought suit on behalf of themselves and all public and non-profit private, elementary and secondary schools and school districts throughout the United States.

The complaints allege that friable asbestos-containing products have been used in school buildings. The

complaints seek compensatory damages, punitive damages, and equitable relief, and allege that the defendants should bear the cost of identification, analysis, repair, removal, and replacement of the products. Plaintiffs' theories of liability include negligence, strict liability in tort, breach of warranty, intentional tort, concert of action, and civil conspiracy.

2. The defendants are as follows:

ACandS, Inc.

Armstrong World Industries, Inc.

Asbestospray Corp.

Asbestos Corporation Limited

Asbestos Fibres, Inc.

Asten Group, Inc.

Bell Asbestos Mines, Ltd.

Benjamin Foster Co.,

Division of Amchem Products

Bes-Tex, Inc.

Brinco Mining Ltd., formerly known as
Cassiar Resources Ltd.

C. Tennant & Sons

Cape Asbestos

Carey-Canada, Inc.

Combustion Engineering, Inc.

Dana Corp.

Eagle-Picher Industries, Inc.

Empire Ace Insulation Manufacturing Corp.

Fibreboard Corporation

Forty-Eight Insulation, Inc.

GAF

Georgia-Pacific Corp.

H. K. Porter Co.

Huxley Development Corp.

J. W. Roberts, Ltd.

Kaiser Cement Corporation

Keene Corp.

Lac D'Amiante Du Quebec, Ltee.

National Gypsum Company

Nicolet Industries

Owens-Corning Fiberglas Corporation

Owens-Illinois Corp.

Pfizer, Inc.

Pittsburgh Corning Corp.

Proko Industries, Inc.

Raymark Industries, Inc.

Rock Wool Manufacturing Co., Inc.

Sprayed Insulation, Inc.

Sprayo-Flake Company

Sprayon Insulation & Acoustics, Inc.

Sprayon Research Corp.

Southern Textile Corp.

Standard Insulations, Inc.

The Celotex Corporation

The Flintkote Corporation

Turner Asbestos Fibres, Ltd.

Turner & Newall Limited

Union Carbide Corp.

Uniroyal, Inc.

United States Gypsum Company

U. S. Mineral Products Co.

W. R. Grace & Co.

Wilkin Insulation Co.

Worben Co., Inc.

The defendants deny that they are liable for any claim asserted by plaintiffs and they intend to pursue numerous affirmative defenses to plaintiffs' claims.

3. The court has not passed upon any of the contentions of the parties. The sending of this Notice is not to be construed as an expression of any opinion by the court about the merits of any claims or defenses. The foregoing is only a summary of the contentions of plaintiffs and defendants. The pleadings and other records of this litigation more fully reflect the respective contentions of the parties. You or your counsel may review the pleadings and other papers filed at the Office of the Clerk, United States District Court, 601 Market Street (2nd Floor), Philadelphia, Pennsylvania.

4. This court has certified a class action in this proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The plaintiff class consists of all elementary and secondary public school districts and non-profit

private schools in the United States, more particularly defined as follows:

> All entities which own or operate in whole or in part any public educational facilities, as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2854, throughout the United States; and all entities which own or operate in whole or in part any non-public, non-profit elementary or secondary educational facilities, including entities with religious affiliations, in the United States, to the extent that such non-profit entities are owned or operated by one or more non-profit corporations or associations no part of the net earnings or which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

This class certification does not imply a conclusion that any entity within the class was injured as a result of the presence of friable asbestos-containing products in its buildings. This class applies to all claims for compensatory damages and equitable relief and participation in the class is voluntary. You are automatically a member of the class unless you exclude yourself, as more fully described in paragraph 7.

WHAT YOU MUST DO TO PROTECT YOUR RIGHTS:

5. If you fall within the definition of the class as set forth above, you are automatically a member of the class. The court has determined that the compensatory damages class will be further defined to include the following three subclasses: (1) class members with asbestos-containing ceiling plaster and/or fireproofing on structural members, and (2) class members with asbestos-containing pipe and boiler insulation, and (3) class members who

have other property (not specified in (1) or (2) above) composed of asbestos. A given school may have only ceiling/fireproofing material, only pipe and boiler insulation, other asbestos-containing products, or any combination thereof in its buildings.

If you wish to exclude yourself from the compensatory damages class, for whatever reasons, you may elect to do so and you may opt out.

6. If you exclude yourself from the compensatory damages class, you will not be bound by any determination in the class concerning your excluded damage claims. You will be free to initiate your own independent law suit for these claims, but you will not share in any compensatory damages recovery on behalf of the class or any other benefit that may result from the class action litigation relating to your excluded compensatory damage claims.

7. You may exclude yourself from the compensatory damages class only if you request exclusion in writing by signing and mailing the enclosed Exclusion Request to the Clerk, United States District Court for the Eastern District of Pennsylvania, P.O. Box ___, Philadelphia, PA 19106, no later than midnight, August 1, 1987. The filing of a law suit in your own behalf does not constitute a request for exclusion from the class for compensatory damages. Failure to mail such request may preclude you from later being excluded if you so desire.

8. If you do not exclude yourself by August 1, 1987, from the compensatory damages class, you will be bound by any class judgment, related to claims as to which you may have not excluded yourself from the class, whether

or not favorable, and you may, but need not, enter an appearance in this action through counsel of your choosing. If you choose to enter an appearance through your own legal counsel, you will be liable for the legal fees of your personal counsel. Otherwise, the named plaintiff school districts and their counsel will represent your interests as a member of the compensatory damages class, as well as a member of the punitive damages class. Class members will not have to personally pay any of the attorneys' fees or cost of counsel whose services benefit this class litigation. To the extent that any monetary recovery is ultimately obtained on behalf of the class, your share of any recovery will be assessed, along with all others, on a pro rata or other fair and equitable basis prior to distribution, for the costs and expenses of this action, including such counsel fees as may be awarded by the court. A list of class counsel is available from the Clerk of Court at the address listed on the Notice of Exclusion.

9. If you wish to remain a member of the class for all purposes, you need do nothing at this stage of the proceedings.

10. At the time of the filing of the complaints in these cases, plaintiffs could not sue Johns-Manville Corporation, its parent Manville Corporation, and certain of their affiliates (collectively "Manville"), Amatex Corp., or Unarco Industries, Inc., because these companies had filed petitions in various United States Bankruptcy Courts. Pursuant to orders of these United States Bankruptcy Courts, the plaintiffs may not sue these companies in this class action proceeding. Since these companies are not defendants in the litigation which is the subject of

this notice, the class action certification described herein does not apply to these companies.

11. In the Manville bankruptcy proceeding, the Bankruptcy Court ordered that in order to preserve any claim which you may have against Manville for the cost of testing or asbestos abatement action, a separate claim must be filed on the form provided by Manville in the Manville bankruptcy proceeding in the Southern District of New York. Any action taken by you in the Bankruptcy Court will not affect your rights in this class action. Rather, if you wish to remain a member of the class in the national class action proceeding which has been filed in the United States District Court for the Eastern District of Pennsylvania, you need do nothing at this stage of the proceeding.

12. Requests for changes of address, and inquiries regarding this Notice should be sent to:

Clerk, United States District Court for the Eastern District of Pennsylvania [In re: Asbestos School Litigation, Master File No. 83-0268]
P.O. Box ___
601 Market Street – Room 2609
Philadelphia, Pa. 19106

/s/ James McGirr Kelly
JAMES McGIRR KELLY, J.
U.S. District Court for the Eastern District of Pennsylvania

Dated: ___, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

REQUEST FOR EXCLUSION FROM LITIGATION CLASS

TO: Michael E. Kunz
Clerk of Court
P.O. Box ___
Philadelphia, Pa. 19106

DO NOT COMPLETE THIS FORM IF YOU WISH TO REMAIN A MEMBER OF THE LITIGATION CLASS

PLEASE TAKE NOTICE THAT _____

_____

(Print name of school, school district

_____

or other entity requesting exclusion)

_____

(Print address)

hereby requests to be excluded from the Litigation Class.

_____ _____

(Date) (Signature)

_____

(Print Name of Signator and relationship of Signator to party requesting Exclusion)

(THE DEADLINE FOR MAILING THIS COMPLETED FORM IS AUGUST 1, 1987).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

(B) NOTICE OF PROPOSED PARTIAL SETTLEMENT OF CLASS ACTION, CERTIFICATION OF TEMPORARY SETTLEMENT CLASS, AND SETTLEMENT HEARING RELATING TO SCHOOL ASBESTOS CLAIMS

This Notice is being issued to advise you that the Court has scheduled a hearing on June 18, 1987 at 10:00 a.m. in Courtroom 8A of the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106, to consider whether to approve a partial settlement with two of the defendants named in this litigation (the "Litigation"). The purpose of this Notice is to provide you with information so that, as a possible member of the class which may be affected by the partial settlement of this action, you may make an informed decision with respect to your participation in that partial settlement. These matters are described in more detail below.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS MAY BE AFFECTED BY LEGAL PROCEEDINGS IN THIS LITIGATION.

- THIS NOTICE AND THE OPPORTUNITY TO OPT OUT INCLUDED HEREIN RELATES ONLY TO THE *SETTLEMENT* CLASS ESTABLISHED PURSUANT TO THE AGREEMENT OF SETTLEMENT WITH DEFENDANTS OWENS-ILLINOIS, INC. AND PROKO INDUSTRIES,

INC. IT IS NOT TO BE CONFUSED WITH THE CERTIFICATION OF THE LITIGATION CLASS AS AGAINST ALL DEFENDANTS BY THE DISTRICT COURT ON SEPTEMBER 28, 1984.

FURTHER, THIS NOTICE IS NOT TO BE CONFUSED WITH THE PROOF OF CLAIM FOR PROPERTY DAMAGE CLAIMANTS WHICH MAY HAVE BEEN SENT TO YOU BY ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN THE MANVILLE CORPORATION BANKRUPTCY PROCEEDING. THE MANVILLE CORPORATION IS NOT A DEFENDANT IN THIS CLASS ACTION. PRESENTLY, ALL PROCEEDINGS REGARDING MANVILLE ARE BEING HANDLED BY THE BANKRUPTCY COURT.

This Notice is given pursuant to Rule 23 of the Federal Rules of Civil Procedure. This Notice is not an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by any party in this litigation. The purpose of this Notice is to inform you of the pendency of a proposed partial settlement, and of the rights you have with respect to the proposed settlement.

BACKGROUND

1. There currently are 51 defendants involved in the Litigation. All of the defendants, including the two Settling Defendants, Owens-Illinois, Inc. ("O-I"), and Proko Industries, Inc. ("Proko"), deny that they are liable for any claim asserted by plaintiffs.

NOTICE OF PROPOSED PARTIAL SETTLEMENT OF CLASS ACTION, OF CERTIFICATION OF SETTLEMENT CLASS, AND OF SETTLEMENT HEARING

2. NOTICE IS HEREBY GIVEN THAT THE SETTLING DEFENDANTS LISTED BELOW HAVE CREATED SETTLEMENT FUNDS AGGREGATING $4,500,000.00 ("FUND"), EXCLUSIVE OF INTEREST ON THE FUND, FOR SCHOOLS AND SCHOOL DISTRICTS WHICH MAY HAVE HAD INSTALLED ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS IN THEIR SCHOOL BUILDINGS:

DEFENDANT	SETTLEMENT FUND CONTRIBUTION
Owens-Illinois, Inc.	$3,450,538.00
Proko Industries, Inc.	$1,039,462.00

AS OF AUGUST 7, 1986, THE FUND WILL AGGREGATE $4,800,000.00 AND CONTINUES TO EARN INTEREST.

3. Class Plaintiffs' counsel recommend Court approval of the Proposed Partial Settlement as fair and reasonable and in the best interests of the members of the Class, in view of (1) the risks and costs of continuing the Litigation as against O-I and Proko, (2) the substantial and valuable benefits which will accrue under the terms of the Proposed Partial Settlement to those members of the Settlement Class who do not opt-out, and (3) the favorable total sum of these settlements compared to potential recoveries from the remaining non-settling defendants in the Litigation.

4. Notice also is hereby given that on June 16, 1986, pursuant to Rule 23(e) of the Federal Rules of Civil

Procedure, a temporary settlement class was certified by the United States District Court for the Eastern District of Pennsylvania. This Settlement Class includes all public and non-profit private schools in the United States and is defined as follows:

> All entities which own or operate in whole or in part any public educational facilities, as defined in Section 198(a)(1) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. Section 2854, throughout the United States; and all entities which own or operate in whole or in part any non-public, non-profit elementary or secondary educational facilities, including entities with religious affiliations, in the United States, to the extent that such non-profit entities are owned or operated by one or more non-profit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

The Settlement Class has been certified for the purpose of giving this Notice to each Settlement Class member school or school district of the proposed partial settlement ("Proposed Partial Settlement") with defendants O-I and Proko, and allow it either to exclude itself from the Settlement Class or to voice any objection to or support for the Proposed Partial Settlement. Members of the Settlement Class not excluding themselves will participate in the benefits of the Agreement, including the Fund established by it, if it is finally approved by the Court.

5. Notice also is hereby given, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of an Order of the United States District Court for the Eastern District of Pennsylvania entered March 27, 1987, that a hearing will be held before the Honorable James McGirr Kelly, in

Courtroom 8A of the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, 19106, at 10:00 a.m. on August 14, 1987, (the "Approval Hearing"), for the purpose of determining whether the Proposed Partial Settlement with O-I and Proko is fair and reasonable. At the Approval Hearing, the Court will consider whether it should approve the Agreement of Settlement dated March 26, 1986 ("Agreement") that was entered into between plaintiffs and O-I and Proko, and partially dismiss the Litigation with respect to O-I and Proko. The Approval Hearing, once commenced, may be adjourned from time to time by the Court, without further notice.

6. At the Approval Hearing, any member of the Settlement Class who has not filed a request for exclusion from the Settlement Class, in the manner set forth below, may appear in person or by counsel and be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the Proposed Partial Settlement. However, no party will be heard in opposition to the Proposed Partial Settlement and no paper or brief submitted by any such party will be accepted or considered by the Court unless, on or before August 1, 1987, such person (a) files with the Clerk of the Court notice of its intention to appear, together with a statement that indicates the basis for such opposition, and (b) serves copies thereof, and copies of any other papers or briefs it files with the Court, in person or by mail, upon each of the following attorneys:

1. David Berger, Esq.
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103

2. Herbert B. Newberg, Esq.
HERBERT B. NEWBERG, ESQ., PC
200 Lippincott Building
227 S. 6th Street
Philadelphia, PA 19106

Counsel for Class Plaintiffs

3. Gita F. Rothschild, Esq.
McCARTER & ENGLISH
550 Broad Street
Neward, NJ 07102-4578

Counsel for Defendant
Owens-Illinois, Inc

4. Steven R. Waxman, Esq.
BURRELL, WAXMAN, DONAGHY & LEE
230 S. Broad St., 17th Floor
Philadelphia, PA 19102

Counsel for Defendant
Proko Industries, Inc.

DESCRIPTION OF THE PARTIAL SETTLEMENT

I. Authorized Settlement Fund Expenditures

7. The Fund, established pursuant to the Proposed Partial Settlement, as embodied in the Agreement, is being maintained in full, subject only to such deductions or expenditures as are expressly provided in the Agreement and approved or otherwise ordered by the Court. The Fund is to be distributed to Settlement Class members or otherwise as the Court may direct upon final judicial approval of the Proposed Partial Settlement or at

the conclusion of this Litigation, or is to be returned to Settling Defendants in the event that this Proposed Partial Settlement fails to obtain final judicial approval. Notice is expressly given that, subject to approval of the Court, the Fund may be dispersed in part to defray the costs of the Litigation, including such reasonable attorneys' fees as may be awarded by the Court.

8. Subject to Court approval, the plaintiffs also will be reimbursed and indemnified out of the Fund for all expenses and costs related to this Notice and incurred in the administration of the Fund.

9. Except with respect to the expenses of Notice or as otherwise expressly permitted by provisions of the Agreement and by the Court, or otherwise ordered by the Court, no distribution of the Fund is to be made until there has been a final judicial approval of the Proposed Partial Settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and until a final judgment of dismissal has been entered with respect to Settling Defendants against all plaintiffs and all members of the Settlement Class (except Opt-outs and Excluded Districts), and an Order of the Court allowing such distribution has been entered.

II. DISMISSAL OF THE LITIGATION AGAINST SETTLING DEFENDANTS

10. In the event of final judicial approval of the Proposed Partial Settlement, the plaintiffs, and any and all members of the Settlement Class who are not Opt-outs or Excluded Districts, will be deemed to have agreed that they will be forever barred from instituting, maintaining,

or prosecuting only against O-I and Proko any of the class Action Claims with respect to the installation, prior to September 28, 1984, of asbestos-containing material in any of the school buildings which are the subject of the Litigation, and that O-I and Proko are to be discharged from any and all responsibility with respect to such claims.

III. Reserved Rights of Settling Defendants and of the Class Members

11. CLASS PLAINTIFFS AND SETTLEMENT CLASS MEMBERS HAVE EXPRESSLY RESERVED ALL THEIR RIGHTS AND CLAIMS AGAINST ALL NON-SETTLING DEFENDANTS. THE AGREEMENT OF SETTLEMENT AND ANY COVENANT WHICH IS EXECUTED PURSUANT THERETO IS *NOT* INTENDED AND IS *NOT* TO BE CONSTRUED AS A RELEASE OR DISMISSAL BY CLASS PLAINTIFFS AND SETTLEMENT CLASS MEMBERS OF ANY CLAIMS OR RIGHTS AGAINST ANY NON-SETTLING DEFENDANT.

12. Under certain conditions, either O-I or Proko (or both, may, at their option exercised in good faith, elect to withdraw from the Agreement, whereupon the Agreement will be null and void as to the defendant(s) so withdrawing (but will remain in full force and effect as to any defendant not so withdrawing).

13. The Proposed Partial Settlement of the Litigation does not include or affect claims by the School Districts of (i) Los Angeles, California, (ii) Philadelphia, Pennsylvania (iii) Cinnaminson, New Jersey and (iv) any other such litigation brought or contemplated against O-I

or Proko in which a binding separate settlement agreement has been reached as of March 26, 1986 (collectively, the "Excluded District"). Any payments made by O-I or Proko to the Opt-outs or to the Excluded Districts, or to any of them, will be in addition to the settlement payments to the Settlement Class out of the Fund.

14. In the event of final judicial approval of the Proposed partial Settlement and in the event that any Settlement Class member obtains a judgment against one or more *non*-settling defendants in a class action or otherwise, and those non-settling defendants obtain a judgment against one or more of the Settling Defendants for contribution or indemnity, then such Settlement Class member will be required to reduce any judgment or proportion thereof obtained from any such non-settling defendants by the proportionate amount of such judgment attributable to O-I's and Proko's sales of asbestos-containing materials and installations of such asbestos-containing materials in and to buildings owned or operated by such Settlement Class member. However, in such event, the reduction in judgment will not exceed the amount of the judgment by the non-settling defendants as against Settling Defendants, and no plaintiff or Settlement Class member will be required to pay any sums to O-I or Proko on account of any liability of O-I or Proko in any such action, nor to pay any costs or fees of O-I or Proko expended to appear in or defend any such action.

OPPORTUNITY TO OPT-OUT FROM SETTLEMENT CLASS

15. Any member of the Settlement Class who does not desire to remain a member of the Settlement Class

may request exclusion therefrom by sending to Michael E. Kunz, Clerk of the Court, United States District Court for the Eastern District of Pennsylvania, c/o P.O. Box ___, Philadelphia, Pennsylvania, 19106, a completed Exclusion Form, as attached to this Notice. Such requests for exclusion must set forth all the information requested in the Exclusion Form. Each school or school district from which a completed request for exclusion postmarked by June 8, 1987, has been received, will be excluded.

16. *ANY PERSON EXCLUDED FROM THE SETTLEMENT CLASS WILL NOT BE ALLOWED TO OBJECT TO THE PROPOSED PARTIAL SETTLEMENT AND WILL NOT PARTICIPATE IN RECEIVING THE BENEFITS OF THE FUND OF $4,500,000.00.* If you are excluded from the Settlement Class you will not be bound by any judgment which may be entered in the Litigation as against the Settling Defendants and may pursue whatever legal remedies you may have against the Settling Defendants. If you do not request exclusion from the Settlement Class in the manner set forth above, you will be bound by whatever judgment is rendered, including any judgment entered approving the Settlement.

17. The Settlement Class and the procedure for, and consequences of, excluding yourself from the Settlement Class that is discussed above is *not* to be confused with the pending litigation Class certified against all the defendants in these consolidated actions.

FURTHER, A REQUEST FOR EXCLUSION FROM THE SETTLEMENT CLASS WILL NOT CONSTITUTE AN EXCLUSION FROM THE LITIGATION CLASS, NOR WILL PARTICIPATION IN THE SETTLEMENT CLASS

PRECLUDE YOU FROM LATER EXCLUDING YOURSELF FROM THE LITIGATION CLASS.

EXAMINATION OF PAPERS

21. The summary of certain provisions of the Agreement, and of the Proposed Partial Settlement embodied therein, which is contained in this Notice, is not intended, and should not be construed, as a complete statement of the Agreement or of the Litigation. For a more detailed statement of the matters involved in the Litigation, including the terms of the Agreement, you are referred to the papers on file under the caption, *In re Asbestos School Litigation*, Master File No. 83-0268, which may be inspected during regular business hours at the Office of the Clerk of the United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Philadelphia, Pennsylvania 19106. If you have any questions about this Notice, please write to one of the Class counsel. PLEASE DO NOT DIRECT QUESTIONS TO THE COURT OR THE CLERK'S OFFICE.

PROVISION FOR ATTORNEYS' FEES AND EXPENSES

22. Upon the Court's approval of the Settlement, counsel for Class Plaintiffs may apply to the Court for an award of attorneys' fees and expenses incurred in the prosecution of the Litigation with respect to O-I and Proko, to be drawn from the Settlement Fund. Class Plaintiffs also may apply to the Court for use of some or all of such an award to cover the costs of Class Plaintiffs' proceeding with the Litigation as against all of the other defendants who have not settled. In any event, any

awards, and the use to be made of such awards, will be determined by the Court upon application of Class Plaintiffs.

MICHAEL E. KUNZ
Clerk of Court
United States District Court for
the Eastern District of
Pennsylvania

DATED: ___, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

REQUEST FOR EXCLUSION FROM
SETTLEMENT CLASS

TO: Michael E. Kunz
Clerk of Court
P.O. Box ___
Philadelphia, Pa. 19106

DO NOT COMPLETE THIS FORM IF YOU WISH TO REMAIN A MEMBER OF THE SETTLEMENT CLASS

PLEASE TAKE NOTICE THAT _____

_____

(Print name of school, school district

_____

or other entity requesting exclusion)

_____

(Print address)

hereby requests to be excluded from the Settlement Class with respect to the Proposed Settlement with defendants Owen-Illinois, Inc. and Proko Industries, Inc.

_____ _____

(Date) (Signature)

_____

(Print Name of Signator and relationship of Signator to party requesting Exclusion)

(THE DEADLINE FOR MAILING THIS COMPLETED FORM IS AUGUST 1, 1987).

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

REQUEST FOR EXCLUSION FROM
SETTLEMENT CLASS

TO: Michael E. Kunz
Clerk of Court
P.O. Box 2179
Philadelphia, PA 19106

PLEASE TAKE NOTICE THAT all public schools in the State of Hawaii hereby request to be excluded from the Settlement Class with respect to the Proposed Partial Settlement with defendants Owens-Illinois, Inc., and Proko Industries, Inc.

SPECIAL NOTE: The Department of the Attorney General represents the Department of Education, which has jurisdiction over all public schools in the State of Hawaii. On or about May 18, 1987, the Department of the Attorney General received a copy of a notice printed in the *Asbestos Litigation Reporter,* April 3, 1987, which stated that prospective members of the Settlement Class and the Litigation Class would have until August 1, 1987, to mail in notice of opting out of either of these classes. On or about July 24, 1987, the undersigned deputy attorney general telephoned the firm of David Berger, Attorneys at Law, representing Class Plaintiffs, and spoke to Sheldon Toubman, Esq., to determine the status of the proceeding. During this telephone call on or about July 24, 1987, the Department of the Attorney General learned for the first time that the deadline for opting out of the Settlement

Class had been changed to June 22, 1987, and that no notice had yet been sent out to provide an opportunity to opt out of the Litigation Class.

If the June 22, 1987, deadline is deemed to apply in any respect to any public school in Hawaii, good cause exists to extend this deadline. The Department of the Attorney General relied upon the deadline date published in the *Asbestos Litigation Reporter* on April 3, 1987. Should it be necessary to do so, the Department of the Attorney General will seek an order from the above-captioned court permitting the public schools of Hawaii to opt out of the Settlement Class.

7/31/87 (Date)

/s/ David Waters
DAVID WATERS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served upon the following by United States mail, postage prepaid, at their addresses on December 11, 1987:

DAVID BERGER, ESQ.
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103

HERBERT B. NEWBERG, ESQ.
HERBERT B. NEWBERG, ESQ., PC
200 Lippincott Building
227 S. 6th Street
Philadelphia, PA 19106

GITA F. ROTHSCHILD, ESQ.
McCARTER & ENGLISH
550 Broad Street
Neward, NJ 07102-4578

STEVEN R. WAXMAN, ESQ.
BURRELL, WAXMAN, DONAGHY & LEE
230 S. Broad Street, 17th Floor
Philadelphia, PA 19102

HERITAGE CHRISTIAN SCHOOLS
P.O. Box 555
Saddle Brook, New Jersey 07662

BIBLE METHODIST CONNECTION OF
CHURCHES SCHOOL MINISTRY
Rt. 6, Box 1730
Pill City, Alabama 35125-9556

WEYMOUTH PUBLIC SCHOOLS
111 Middle Street
Weymouth, Massachusetts 02189

/s/ David Waters
DAVID WATERS
Deputy Attorney General

Attorney for State of Hawaii

2482I

EXHIBIT "C"

[Letterhead deleted]

August 13, 1987

RE: O-I/Proko Settlement

David Waters, Deputy Attorney General
State of Hawaii
Department of the Attorney General
State Capitol
Honolulu, Hawaii 96813

Dear Mr. Waters:

I have received a copy of your purported "Request for Exclusion from Settlement Class" in connection with the settlement reached between plaintiffs and defendants, Owens-Illinois and Proko. I enclose for your information a copy of the Order entered by The Honorable James McGirr Kelly dated July 21, 1987, granting final approval to the settlement between defendants Owens-Illinois and Proko and all elementary and secondary schools which did not properly exclude themselves from the class by July 21, 1987. Therefore, your attempt to exclude all Hawaii public schools from the O-I/Proko settlement is ineffective as a matter of law.

For your information, all public school districts in Hawaii received proper notice of the class settlement and the forms to file in the event they wished to be excluded from the settlement class. That notice required all requests for exclusion from the settlement class to be mailed by June 22, 1987. At the hearing on final approval, however, Judge Kelly extended the date until July 21, 1987. No exclusion forms were received. A complete list of the Hawaii school districts receiving notice is on file with the Clerk of the Court in which this case is pending.

Under the circumstances, Owens-Illinois will oppose any attempt by any Hawaii school to file an action for asbestos abatement costs against Owens-Illinois.

Very truly yours,

/s/ Gita F. Rothschild
Gita F. Rothschild

GFR/cas
cc: Michael E. Kunz, Clerk of the Court
David Berger, Esq.
Herbert B. Newberg, Esq.
Steven R. Waxman, Esq.
Arlene Fickler, Esq.
Ralph Brenner, Esq.
David Gray, Esq.
Ms. Nagwa Hultquist

CERTIFICATE OF SERVICE

I Hereby certify that one copy of the foregoing document was served upon the following persons at the addresses shown below, by certified mail, on July 31, 1987:

Michael E. Kunz
Clerk of Court
P. O. Box 2179
Philadelphia, PA 19103

David Berger, Esq.
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103

Herbert B. Newberg, Esq.
HERBERT B. NEWBERG, ESQ., PC
200 Lippincott Building
227 S. 6th Street
Philadelphia, PA 19106

Counsel for Class Plaintiffs

Gita F. Rothschild, Esq.
McCARTER & ENGLISH
550 Broad Street
Neward, NJ 07102-4578

Counsel for Defendant
Owens-Illinois, Inc.

Steven R. Waxman, Esq.
BURRELL, WAXMAN, DONAGHY & LEE
230 S. Broad Street, 17th Floor
Philadelphia, PA 19102

Counsel for Defendant
Proko Industries, Inc.

DATED: Honolulu, Hawaii, July 31, 1987.

/s/ David Waters
DAVID WATERS
Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER

It is hereby ORDERED that all public schools and all public school districts located in the State of Hawaii are excluded from the settlement class for the settlement involving Proko Industries, Inc., and Owens-Illinois, Inc. Neither the State of Hawaii nor any of its public schools or public school districts should be bound in any respect

to any of the terms of the aforementioned settlement agreement.

James McGirr Kelly, U.S.D.J.

8089G

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

CLASS PLAINTIFFS' REPLY TO RESPONSE OF DEFENDANTS, OWENS-ILLINOIS, INC. AND PROKO INDUSTIRES, INC. TO MEMORANDUM OF THE STATE OF HAWAII REGARDING EXCLUSION FROM SETTLEMENT CLASS

Class Plaintiffs respond herein to the December 28, 1987 Response of Defendants, Owens-Illinois, Inc., and Proko Industries, Inc., to the Memorandum of the State of Hawaii (hereinafter, "O-I/Proko Response") in the above matter. In their response, Owens-Illinois and Proko Industries (hereinafter, "O-I" and "Proko") objected to the request of the State of Hawaii for a modification to the Court's Pretrial Order No. 88, which allowed only class members that had submitted Requests for Exclusion on or before July 21, 1987 to opt-out of the partial settlement with these two defendants. As discussed below, class plaintiffs have no objection to allowing the public school districts in the State of Hawaii to opt-out of this settlement based upon their Request for Exclusion filed on July 31, 1987.

As O-I and Proko correctly point out, O-I/Proko response, at 14, counsel for both the settling defendants and class plaintiffs advised the Court that they had no objection to excluding from the Settlement Class those schools and school districts which had requested exclusion therefrom on or before the date of the settlement approval hearing, July 21, 1987. However, class plaintiffs,

as they previously stated in their joint letter with the settling defendants to the Court dated November 13, 1987, have no objection to extending that deadline to include the State of Hawaii's untimely request, as well as that of the three other schools referenced in that joint letter. The Request for Exclusion from the Settlement Class submitted on behalf of the State of Hawaii's school districts was filed on July 31, 1987, only ten days after the date established by the Court as the cutoff for such Requests for Exclusion. The opt-out requests by the other three schools were submitted on July 22, July 28, and August 5, 1987. Thus, extending the deadline the few days to allow Hawaii's public schools to opt-out will not allow any other schools of school districts to take advantage of the short extension, except for those three schools already referenced in the same November 13, 1987 letter.

Accordingly, class plaintiffs, consistent with the position taken in their November 13, 1987 joint letter to the Court, continue to have no objection to allowing the State of Hawaii to opt-out its public school districts from the Settlement Class with respect to defendants O-I and Proko.

Respectfully submitted,

/s/ Herbert B. Newberg
Herbert B. Newberg
Harvey S. Kronfeld
Gerald E. Wallerstein
Martin J. D'Urso
HERBERT B. NEWBERG, ESQ., P.C.
227 S. 6th St., Suite 200
Philadelphia, PA 19106
(215) 922-4740

/s/ David Berger
David Berger
Daniel Berger
Sheldon V. Toubman
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Co-Lead Counsel for Class Plaintiffs

Dated: January 6, 1988

CERTIFICATE OF SERVICE

I, Sheldon V. Toubman, hereby certify that on this date I caused to be served a true and correct copy of Class Plaintiffs' Reply to Response of Defendants, Owens-Illinois, Inc., and Proko Industries, Inc., to the Memorandum of the State of Hawaii, the original of which was filed this date with the Clerk of the Court, upon all counsel of record and upon David Waters, Deputy Attorney General for the State of Hawaii, by United States first class mail, postage prepaid, except that Ralph W. Brenner, Lawrence T. Hoyle, Jr., and Steven R. Waxman were served by hand delivery.

/s/ Sheldon V. Toubman
SHELDON V. TOUBMAN

DATED: January 6, 1988

APPENDIX K

NOTICE OF APPEAL TO THE THIRD CIRCUIT COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

(Filed March 28, 1988)

Notice is hereby given that the State of Hawaii hereby appeals to the United States Court of Appeals for the Third Circuit from Order No. 109, entered in this action on the 4th day of March, 1988, which amended the "Judgment Pursuant To F.R.CIV.P. 54(b) And Pretrial Order No. 88 Finally Approving 1986 Agreement Of Settlement with Defendants Owens-Illinois, Inc. And Proko Industries, Inc." entered July 21, 1987.

Dated: Honolulu, Hawaii, March 24, 1988.

Respectfully submitted,

/s/ David Waters
DAVID WATERS
Deputy Attorney General
Attorney for State of Hawaii

State of Hawaii
Department of the Attorney General
State Capitol, Room 405
415 South Beretanis Street
Honolulu, Hawaii 96813

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served upon the following by United States mail, postage prepaid, at their addresses on March 24, 1988:

DAVID BERGER, ESQ.
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, Pennsylvania 19103

HERBERT B. NEWBERG, ESQ.
HERBERT B. NEWBERG, ESQ., PC
200 Lippincott Building
227 S. 6th Street
Philadelphia, Pennsylvania 19106

GITA F. ROTHSCHILD, ESQ.
McCARTER & ENGLISH
550 Broad Street
Newark, New Jersey 07102-4578

STEVEN R. WAXMAN, ESQ.
BURRELL, WAXMAN, DONAGHY & LEE
230 S. Broad Street, 17th Floor
Philadelphia, Pennsylvania 19102

HERITAGE CHRISTIAN SCHOOLS
P.O. Box 555
Saddle Brook, New Jersey 07662

BIBLE METHODIST CONNECTION OF
CHURCHES SCHOOL MINISTRY
Rt. 6, Box 1730
Pill City, Alabama 35125-9556

WEYMOUTH PUBLIC SCHOOLS
111 Middle Street
Weymouth, Massachusetts 02189

/s/ David Waters
DAVID WATERS
Deputy Attorney General

Attorney for State of Hawaii

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER NO. 85
(Filed April 13, 1987)

AND NOW, this 13th day of April, 1987, it is ORDERED that the Notice of Proposed Partial Settlement of Class Action, Certification of Temporary Settlement Class, and Settlement Hearing Relating to school Asbestos Claims attached as Exhibit "A" hereto amends the Notice attached as Exhibit "A" to Order No. 84.

BY THE COURT:
/s/ James Kelly
JAMES McGIRR KELLY, J.

[Entered April 14, 1987]

[MATERIAL DELETED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

REQUEST FOR EXCLUSION FROM
SETTLEMENT CLASS

TO: Michael E. Kunz
Clerk of Court
P.O. Box ___
Philadelphia, Pa. 19106

DO NOT COMPLETE THIS FORM IF YOU WISH TO REMAIN A MEMBER OF THE SETTLEMENT CLASS

PLEASE TAKE NOTICE THAT _____

_____

(Print name of school, school district

_____

or other entity requesting exclusion

_____

(Print address)

hereby requests to be excluded from the Settlement Class with respect to the Proposed Partial Settlement with defendants Owens-Illinois, Inc. and Proko Industries, Inc.

_____ _____

(Date) (Signature)

_____

(Print Name of Signator and relationship of Signator to party requesting Exclusion)

(THE DEADLINE FOR MAILING THIS COMPLETED FORM IS JUNE 22, 1987.)

APPENDIX M

IN THE UNITED STATES DISRTICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO.: 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MOTION OF FIBREBOARD CORPORATION TO STRIKE ORDER NO. 85 AND TO REINSTATE ORDER NO. 84
(Filed April 21, 1987)

1. On March 27, 1987, this Court entered Court Order No. 84, providing *inter alia* for the simultaneous issuance in a single mailing of two (2) notices concerning this Proceeding: Notice of a Proposed Partial Settlement of Class Action and Certification of a Temporary Settlement Class ("Settlement Class Notice") and Notice to the Class Action Litigation Relating to School Asbestos Claims. ("Litigation Class Notice").

2. The subject of simultaneous notice was extensively briefed and argued by defendant, Fibreboard, and others prior to this issuance of this Order No. 84.

3. On April 9, 1987, the Honorable Judge McGirr Kelly conducted a conference call with the following counsel: Messrs. Berger and Newberg, counsel for class plaintiffs; Ms. Rothchild and Mr. Donaghy, counsel for settling defendants, Owens-Illinois, Inc. and Proko Industries, Inc.; and Messrs. Brenner, and Corrado, co-liaison counsel for defendants. No prior notice was given to defendant, Fibreboard, of the scheduling of the conference call.

4. Fibreboard understands that during the conference call, plaintiffs' counsel stated their intention to move for a reconsideration of form of the Litigation Class Notice fixed by Court Order No. 84 and requested that the Settlement Class Notice be sent out immediately with new dates for opting out and hearing independent of the Litigation Class Notice. Fibreboard further understands that during the conference call the Court orally granted the request that the Settlement Class Notice could be sent out immediately, and, in effect, amended Order No. 84.

5. Subsequent to the call, plaintiffs submitted an amended form of Settlement Class Notice with a cover letter exhorting the court to "sua sponte" amend the Settlement Class Notice to incorporate changes proposed by plaintiffs' counsel.

6. On April 13, 1987, this Court entered Order No. 85, which amends Order No. 84 by ordering a form of Settlement Class Notice incorporating the changes submitted by plaintiffs' counsel, and providing for immediate and separate mailing of the Settlement Notice prior to mailing of the Litigation Class Notice.

7. Defendant, Fibreboard, was not given any opportunity to participate in discussions which resulted in the amendments to Order No. 84.

8. The Court's reversal of its Order that the notices be mailed jointly, is unnecessary. The Court and all interested parties can expeditiously address any issues the court chooses to entertain. The combined notice properly required by Order No. 84 might still be mailed in a timely manner.

9. Plaintiffs have now submitted a Motion for Modification of Order No. 84 which changes the response dates for members of the litigation class due to the fact that the August 1, 1987 response date would come during school vacation. The same consideration applies to the return date of June 22, 1987 and the hearing date of July 21, 1987 with respect to the settlement class.

10. The reversal of the provisions for joint notice is prejudicial. For the reasons previously set forth in briefs and arguments of this defendant and others and as recognized by the Court in Order No. 84, a combined notice is required. There is no reason or justification to now rush to mail a separate notice and to do so in the manner now contemplated would be prejudicial. Moreover, once notice is sent in this way the prejudice is irreversible.

11. The mailing of separate prior notice of partial settlement, will engender confusion among class members and will unnecessarily deprive the settlement class of the best notice practicable under the circumstances as required by F.R. Civ. P. 23(c)(2).

WHEREFORE, it is respectfully requested that this Court enter an Order striking Order No. 85 and reinstating Order No. 84; or in the alternative, schedule a hearing concerning the issue of the timing of the mailing of the respective Settlement Class Notice and Litigation Class Notice, meanwhile staying the mailing of the Settlement Class Notice.

Respectfully submitted,
LIEBERT, SHORT, FITZPATRICK
& HIRSHLAND

BY: /s/ Francis F. Quinn
FRANCIS F. QUINN, ESQUIRE
Attorney for Defendant
Fibreboard Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM IN SUPPORT OF MOTION OF FIBREBOARD CORPORATION TO STRIKE ORDER NO. 85 AND TO REINSTATE ORDER NO. 84

(Filed Apr. 21, 1987)

On March 27, 1987, this Court entered Order No. 84 which provided for the issuance of simultaneous litigation and settlement notices to the class. On April, 9, 1987, this Court apparently conferred with certain counsel, without notice to other defendants, concerning amendments to the order and the mailing of the Settlement Class Notice. After hearing from only these attorneys, and without giving other counsel an opportunity to be heard, the Court apparently gave oral approval to the immediate issuance of the settlement class notice. Subsequently, plaintiffs' counsel submitted a proposed, revised settlement notice which the Court approved in Order No. 85. Defendant, Fibreboard, objects to both the manner in which the Court reversed its decision to send simultaneous notices and the decision itself. It requests that this Court now strike Order No. 85. Fibreboard itself does

not seek any amendment to Order No. 84 and asks only for its reinstatement. If, however, the Court permits further argument about the form of the notices, it can then expeditiously consider any such proposed amendments. This procedure can be promptly completed to allow prompt, proper notice without denying any party its right to be heard.

This Court's reversal of its holding in Order No. 84 that the Settlement Class Notice and Litigation Class Notice be sent jointly was at best unncessary and at worst a violation of procedural due process requirements. The Court's determination concerning the timing of the mailing of the respective Notices was not one which was lightly considered. The issue was addressed by various parties on numerous occassions in this proceeding. Fibreboard's counsel addressed the matter in oral argument before this Court and further briefed the matter in memoranda to the Court. While the Court cannot be characterized as having acted ex parte in the matter since liaision counsel for defendants participated in the telephone conference call in which the Court reached its determination, the manner in which the telephone conference was conducted without notice to Fibreboard and other defendants and without providing an opportunity for those parties to be heard, did not comport with due process requirements.

Fibreboard does not know whether the Court and others believe that the participation of liaison counsel or their designee sufficiently represent defendants' interest in such matters. It must be stated as strongly as possible

that liaison counsel does not and cannot serve that function. Liaison counsel merely serves a function of expediency in that they facilitate communication in this litigation. See Pre-trial Order No. 1. In no sense may liaison counsel be considered as representing the interest of *all* defendants on any matter unless specifically authorized to do so in the particular matter. In this matter, Fibreboard and other defendants were never advised that the Court would entertain a proposal from plaintiffs to alter a decision which had already been rendered by the Court. While the issue here raised concerns a matter of procedure, the effect of the content and timing of a class notice inevitably has far-reaching substantive impact. It was not a mere matter of Court scheduling or communication to counsel. Liaison counsel is not empowered to represent the defendants on substantive matters and in fact it is understood that Mr. Brenner specifically pointed this out to the Court. The Court's entertaining a Motion by plaintiffs on a matter impacting on defendants' position in this litigation without fair notice and an opportunity to be heard constitutes prejudice to the rights of the defendants.

The Court in reversing its requirement that the two (2) Notices be mailed contemporaneously is apt to maximize confusion among the absentee class members faced with consideration of the respective Notices. The situation is likely to arise wherein class members receive the Settlement Class Notice and prior to the time fixed within which they are to respond to the intitial notice, receive the Class Litigation Notice at a later date. Class members may be confused by the relationship between the two and could conclude that the second supersedes the first, or

otherwise may be confused about the relationship between the two. Other Courts considering this issue have Ruled that where practicable under the circumstances, a settlement notice and class notice are to be sent out simultaneously and that the mailing of separate notices at different times in the absence of circumstances compelling otherwise, does not comport with requirement of F. R. Civ. P. 23(c)(2). In *Nissan Motor Corp. Antitrust Litigation* 552 F.2d 1088, 1104-06 (5th Cir. 1977), the Fifth Circuit held that to mail the one notice without the other is tantamount to the omission of information material to consideration, by the class members of either notice. *Id.* at 1104.

Since the Court amended Order No. 84 by the changes in the Settlement Class Notice set forth in Order No. 85, plaintiffs have filed a Motion for Modification of the Litigation Class Notice. This modification includes a change in the response date by which the putative class members must submit forms for exclusion from the class action. The date has been moved from August 1, 1987 to October 15, 1987 in their proposed modification. The reason given in paragraph 4 of the Motion is as follows: "[i]f the date is changed to October 15, 1987 the schools will be in session, and their administrations will be functioning, so that, at the time that the decision must finally be made with respect to participation in the litigation class, personnel will be available to address the deadline." The same rationale clearly applies with respect to notice of the settlement class and the opportunity to respond by school administrations faced with the decision of whether or not to participate in the settlement class or to be heard at the hearing. The June 22, 1987

response date will clearly come after many of the schools which are in this class are closed for the summer. It is believed by defendant that there are numerous schools throughout this country, both public and private, that close before June. A school which is faced with the important decision of whether to participate in the settlement class or to be heard at the hearing must not be deprived of all opportunity to express its position. The Court should not now rush to these school districts the information concerning the settlement class with the requirement that the class member make a hasty decision which is not fully informed and reasoned. To require the absent school members to appear at a hearing during the summer months when school personnel are not at work in many instances does not provide the proper opportunity for the class members to exercise their rights in this litigation. This Court should not rush to send out the settlement class notice when the plaintiffs themselves recognize that the timing of such notice would deprive the schools of the opportunity to fully consider and exercise their options.

Defendant is not aware of any changes in the circumstances of this case cited by plaintiffs to justify accelerating the notice to the Settlement Class. The only justification for separating the notices was the delay foreseen by the filing of the Motion for Modification. It is clear that in fact the Court could consider such modifications and approved a final Litigation Class Notice which could have been sent by May 26, 1987 as originally provided in Order No. 84. The Settlement Notice would then have issued simultaneously as ordered. It appears now, however, that the only reason to delay the issuance of the

Litigation Notice is a real concern for the efficacy of a notice which requires response during the summer recess. Since the same rationale applies to the projected schedule in Order No. 85, that Order should be stricken and the Notices once again be placed on the same schedule.

Accordingly, defendant, Fibreboard Corporation, respectfully requests that this Court enter an Order striking Order No. 85 and reinstating Order No. 84, providing for simultaneous mailing of the Settlement Class Notice and the Litigation Class Notice. In the alternative, Fibreboard respectfully requests that this Court enter an Order providing for a hearing with respect to this Motion, with the mailing of the Settlement Class Notice to be stayed pending determination of the instant Motion.

Respectfully submitted,
LIEBERT SHORT, FITZPATRICK
& HIRSHLAND
By: Francis F. Quinn
FRANCIS F. QUINN,
ESQUIRE
Attorney for Defendant,
Fibreboard Corporation

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

PRETRIAL ORDER NO. 86

(Filed Apr. 24, 1987)

And now this 23rd day of April, 1987, upon consideration of the Motion of Fibreboard Corp. to Strike Order No. 85 and to Reinstate Order No. 84, Plaintiffs' Response thereto, and after a conference call hearing having been held thereon, it is hereby Ordered that said Motion is denied.

/s/ James Kelly
James McGirr Kelly, U.S.D.J.

[Entered April 24, 1987]